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EVOLUTION IN THE CIVIL RIGHTS REVOLUTION: THE SURVIVAL OF EMPLOYMENT DISCRIMINATION CLAIMS FOR PAIN AND SUFFERING

Michael D. Moberly*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII")\(^1\) protects individuals from employment discrimination on a variety of bases, including race,\(^2\) color,\(^3\) religion,\(^4\) sex\(^5\) and national origin.\(^6\) As the first compre-

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2. The Supreme Court has indicated that the primary legislative objective underlying Title
VII was the equalization of employment opportunities and the removal of barriers that had operated "to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In this context, "the term 'white citizens' is most often contrasted with 'black citizens'—a racial distinction." Rodriguez v. Gattuso, 795 F. Supp. 860, 865 (N.D. Ill. 1992).

3. Title VII cases alleging discrimination on the basis of color are relatively rare. See Felix v. Marquez, 27 Empl. Prac. Dec. (CCH) P 32,241, at 22,767 (D.D.C. 1981). However, "in some situations the most practicable way to bring one's Title VII . . . suit may be on the basis of color discrimination as opposed to race discrimination." Walker v. Secretary of Treasury, 713 F. Supp. 403, 407 (N.D. Ga. 1989). As one court has observed:

Most often "race" and "color" discrimination are viewed as synonymous . . . But the very inclusion of "color" as a separate term in addition to "race" in [an antidiscrimination statute] implies strongly that someone who is of the same race ... but who is treated differently because of his dark skin has been discriminated against because of his color—something expressly forbidden by [the statute].

Rodriguez, 795 F. Supp. at 865.

4. Title VII not only "forbids religious discrimination by . . . employers," but also "requires them reasonably to accommodate the religious practices of their employees." Edwards v. Aguillard, 482 U.S. 578, 618 (1987) (Scalia, J., dissenting) (citing 42 U.S.C. §§ 2000e-2(a)(1), 2000e(j)). Thus, the act places "an affirmative obligation on an employer to attempt to reasonably accommodate an employee's religious observances or practices." Breech v. Alabama Power Co., 962 F. Supp. 1447, 1456 (S.D. Ala. 1997). There is no similar obligation in the case of any other protected Title VII class, see Chalmers v. Tulon Co., 101 F.3d 1012, 1018 (4th Cir. 1996), although the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797 (1994), contain loose analogues in cases involving discrimination against individuals with disabilities, see 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1614.203(c) (1998); see also Prewitt v. United States Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981) ("Outside the handicap discrimination context, the 'reasonable accommodation' issue has arisen in cases involving persons who claim a right to accommodation of their religious duty to refrain from working on certain days."). For a scholarly comparison of the reasonable accommodation requirements in these two different contexts, see Alan D. Schuchman, Note, The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA, 73 IND. L.J. 745 (1998).

5. The inclusion of sex as a protected class has an interesting history, and was described by one court as the product of a "last minute attempt by opponents to block passage" of Title VII. See Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 297 n.12 (N.D. Tex. 1981). Specifically, sex was included at the suggestion of the legislation's opponents, who apparently (but mistakenly) believed that its "wavering supporters" might find the entire act "unpalatable" if it prohibited gender discrimination. See Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 278 (Havard Univ. Press 1992); cf. Francis J. Vans, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966) (indicating that the amendment including sex as a protected Title VII class was offered "in a spirit of satire and ironic cajolery"). However, this view of sex's inclusion as a protected class has occasionally been disputed. See, e.g., Jo Freeman, How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 LAW & INEQ. J. 163, 183 (1991) (concluding that "[a]lthough the prohibition of sex discrimination in employment became law in a manner atypical of major legislation, it was not as thoughtless, or as devious, as has previously been assumed").

6. See 42 U.S.C. § 2000e-2(a). The Supreme Court has observed that "[t]he term 'national origin' . . . refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973). In this regard, national origin discrimination may be closely related to discrimination on the basis of color. See Walker, 713 F. Supp. at 406 (observing that "[a] person's color is closely tied to his ancestry,"
hensive federal employment discrimination legislation ever enacted,\(^7\) Title VII heralded a “revolutionary change” in the legal landscape\(^8\) and in the general nature of the employment relationship.\(^9\)

As originally enacted and enforced for more than a quarter of a century,\(^10\) Title VII attempted to eliminate workplace discrimination through reinstatement provisions,\(^11\) back pay,\(^12\) front pay,\(^13\) prejudgetment or race); see, e.g., Bullard v. OMI Ga., Inc., 640 F.2d 632, 634 (5th Cir. 1981); Spiess v. C. Itoh & Co., 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976). See generally Kahn v. Pepsi Cola Bottling Group, 526 F. Supp. 1268, 1270 (E.D.N.Y. 1981) (“Certainly it is not at all clear that the discrimination suffered by persons from particular countries . . . results from their national origin rather than the circumstance that they are usually not Caucasions.”). In some cases, national origin discrimination could also be reflective of religious discrimination. See, e.g., Fraser v. New York City Bd. of Educ., No. 96 Civ. 0625 (SHS), 1998 U.S. Dist. LEXIS 1338, at *11 (S.D.N.Y. Feb. 9, 1998) (observing that plaintiff’s contention that he was “discriminated against because he was a Hebrew Israelite . . . arguably raised the specter that he had been discriminated against because of his national origin, religion or color”). But see Roach v. Dresser Indus. Valve & Instrument Div., 494 F. Supp. 215, 216 (W.D. La. 1980) (asserting that “a person's national origin has nothing to do with color, religion, or race”).


\(^8\) See McIntosh v. Jones Truck Lines, Inc., 767 F.2d 433, 437 (8th Cir. 1985); see also Smith, 50 F.R.D. at 519-20 (describing Title VII as “novel” legislation that “represented a new Federal prohibition [that] for the first time outlaw[ed] discrimination in private employment as a matter of Federal law”).

\(^9\) One court has observed that “[p]rior to the enactment of Title VII, employers openly discriminated against individuals based on negative stereotypes regarding, inter alia, gender and race.” Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1432 n.16 (D. Wyo. 1994). However, “in most instances Title VII has eliminated the more obvious and explicit forms of discrimination . . . .” Bell & Howell Co. v. NLRB, 598 F.2d 136, 146 n.27 (D.C. Cir. 1979); cf. Hicks v. Brown Group, Inc., 982 F.2d 295, 302 n.10 (8th Cir. 1992) (“Since Title VII was enacted, employers have been on continual notice that discriminatory practices are subject to lawsuits.”) (citation omitted) (quotations omitted).

\(^10\) For a general discussion of Title VII’s application and enforcement during this period, see David L. Rose, Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?, 42 VAND. L. REV. 1121 (1989).

\(^11\) “Reinstatement is such a basic element of Title VII relief that granting such relief is presumed appropriate and, except in extraordinary cases, is required.” Davis v. Kansas City Hous. Auth., 822 F. Supp. 609, 617 (W.D. Mo. 1993); see also Hartman v. Duffey, 8 F. Supp. 2d 1, 6 (D.D.C. 1998) (describing reinstatement as “an important remedy under Title VII”). Indeed, one court has observed (at a time when neither compensatory nor punitive damages was yet available) that any other Title VII relief “is incidental to . . . the equitable remedy of reinstatement.” Mitchell v. Alex Foods, Inc., 572 F. Supp. 825, 826 (N.D. Ga. 1983).

\(^12\) Back pay is “designed to compensate a victim of unlawful discrimination for the economic injuries of discrimination” and thus is also “an integral part of Title VII.” Brunetti v. Wal-Mart Stores, Inc., 525 F. Supp. 1363, 1377 (E.D. Ark. 1981). The amount of back pay awarded to a successful Title VII claimant is typically “the difference between his actual earnings and what he would have earned absent the discrimination of the defendant.” Id. Because back pay reflects
interest, and other equitable remedies. However, legal remedies such as punitive and compensatory damages (including damages for the victim's pain and suffering) were generally unavailable under the act.

Addressing an omission in Title VII, and effectively continuing monetary compensation, it would "ordinarily be categorized as a legal remedy." Taylor v. Rhode Island, 736 F. Supp. 15, 17 (D.R.I. 1990). In Title VII cases, however, it is "part of the equitable remedy of reinstatement." Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979). Thus, the courts have "almost universally defined back pay under Title VII as equitable relief." Taylor, 736 F. Supp. at 17.

13. While reinstatement is the "preferred" remedy for Title VII violations, "it may not always be an appropriate one." Webb v. District of Columbia, 146 F.3d 964, 976 (D.C. Cir. 1998). Where it is not, the alternative equitable remedy of front pay, reflecting "the discounted present value of the difference between the earnings [an employee] would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment," may be awarded in lieu of reinstatement. Williams v. Pharmacia, Inc., 137 F.3d 944, 953 (7th Cir. 1998) (first alteration in original) (internal punctuation and citations omitted).

14. The Supreme Court has observed: "[A]pparently all the United States Courts of Appeals that have considered the question agree, that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers. This conclusion surely is correct." Loeffler v. Frank, 486 U.S. 549, 557-58 (1988) (footnote omitted).

15. The Act's principal remedial provision states:
If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice... the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay... or any other equitable relief as the court deems appropriate.


16. See Robinson v. City of Lake Station, 630 F. Supp. 1052, 1064 (N.D. Ind. 1986) ("Damages for 'pain and suffering' are compensatory and thus are not recoverable under Title VII"); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676, 679 (E.D.N.Y. 1979) ("[C]ompensatory damages for pain and suffering have not been allowed under Title VII."); J. LeVonne Chambers & Barry Goldstein, Title VII at Twenty: The Continuing Challenge, 1 LAB. LAW. 235, 255 (1985) (observing that there was "no monetary remedy for the pain, suffering, and humiliation of... discrimination" under Title VII as originally enacted).

17. See United States v. Burke, 504 U.S. 229, 238 (1992) ("Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief."). For one of many arguments that Title VII's original remedial scheme was inadequate to fulfill the statutory objectives, see Michael W. Roskiewicz, Note, Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination, 43 WASH. U. J. URB. & CONTEMP. L. 391, 392-401 (1993).

18. See Ynclan v. Department of Air Force, 943 F.2d 1388, 1390 n.1 (5th Cir. 1991) (observing that "Title VII does not... prohibit dismissal due to handicap"); Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (indicating that "discrimination based upon physical and mental limitations" is not prohibited by Title VII); Evans v. Trowbridge, 60 Fair Empl. Prac. Cas. (BNA) 324, 325 (E.D. La. 1992) ("The plain language of Title VII clearly provides no cause of action for discrimination on the basis of handicap."); Merrifield v. Beaven/Inter-Am. Cos., 3
the civil rights revolution that prompted its enactment,\textsuperscript{19} the Americans with Disabilities Act of 1990 ("ADA")\textsuperscript{20} prohibits discrimination in employment\textsuperscript{21} on the basis of an individual's disability.\textsuperscript{22} Prior to the ADA's enactment, Congress had repeatedly declined to amend Title VII to prohibit such discrimination.\textsuperscript{23} The federal disability discrimination legislation that did exist\textsuperscript{24} had proven to be largely ineffective.\textsuperscript{25} There-


\textsuperscript{21} "Among other things, the ADA protects millions of disabled Americans from discrimination in employment." EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1098 (6th Cir. 1998) (Moore, J., dissenting). However, the ADA's prohibition of disability discrimination extends well beyond the employment context. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). The Act also prohibits such discrimination in connection with access to public accommodations, in the provision of public services and public transportation, and in telecommunications. See Doe v. Kohn Nat'l & Graf, P.C., 862 F. Supp. 1310, 1321 n.8 (E.D. Pa. 1994) (public accommodations and public services); Trautz v. Weisman, 819 F. Supp. 282, 293 (S.D.N.Y. 1993) (public services); Kinney v. Yerusalmi, 812 F. Supp. 547, 548-50 (E.D. Pa. 1993) (public transportation and communications). Indeed, one court has remarked that "as a general civil rights statute, the ADA involves every area of law." Lightbourn v. County of El Paso, 118 F.3d 421, 430 (5th Cir. 1997).

\textsuperscript{22} In particular, the ADA prohibits disability discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). See generally Anderson, 924 F. Supp. at 771 (observing that the ADA "bars discrimination against the disabled in all aspects of employment").

\textsuperscript{23} See Fink v. Kitzman, 881 F. Supp. 1347, 1368 (N.D. Iowa 1995) ("Periodically through the mid-1980s there [were] attempts to amend the Civil Rights Act of 1964 to include people with disabilities."); DeSapio, 540 N.Y.S.2d at 937 ("While bills have been proposed to amend Title VII to cover handicapped individuals . . . such legislation has not been enacted . . . ") (citation omitted). For an academic discussion of this issue, see Stephen D. Erf, Note, \textit{Potluck Protections for Handicapped Discriminates: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability}, 8 Loy. U. Chi. L.J. 814 (1977).

\textsuperscript{24} "The ADA was not the first attempt . . . to eradicate discrimination on the basis of disabilities." Valentine, 939 F. Supp. at 1389; see also Pedigo v. P.A.M. Transp., Inc., 891 F. Supp.
fore, the ADA represents a "revolution" in the field of rights for disabled persons.\textsuperscript{6}

Somewhat surprisingly, the ADA contains no specific remedial provisions of its own.\textsuperscript{7} Instead, it incorporates Title VII's remedial scheme,\textsuperscript{8} despite the widely held view that disability discrimination statutes patterned after other civil rights laws may be ineffective.\textsuperscript{9} Thus, as under Title VII,\textsuperscript{10} one could not recover either compensatory nor punitive damages under the ADA as originally enacted.\textsuperscript{11}

\begin{itemize}
\item \textsuperscript{6}See Helen L., 46 F.3d at 331 (discussing the "shortcomings and deficiencies" of federal disability discrimination legislation predating the ADA); Valentine, 939 F. Supp. at 1388 (discussing the "perceived inadequacies" of pre-ADA disability discrimination laws).
\item \textsuperscript{7}See Trautz, 819 F. Supp. at 294; see also Bartlett v. New York State Bd. of Law Exam'r's, 970 F. Supp. 1094, 1133 (S.D.N.Y. 1997) (quoting Trautz, 819 F. Supp. at 294); cf. Doore, supra note 19, at 372 (noting that the ADA has been "widely hailed as landmark litigation"). Like Title VII, the ADA is undoubtedly "one of the most important civil rights statutes passed this century." Prevo's Family Mkts., 135 F.3d at 1098 (Moore, J., dissenting); see also Doore, supra note 19, at 372 (describing the ADA as the "most significant labor and employment law in recent history"); Ward v. Johns Hopkins Univ., 861 F. Supp. 367, 375 (D. Md. 1994) (characterizing Title VII as "[o]ne of the most important pieces of legislation which prompted the cause of equal employment opportunity") (quoting H.R. Rep. No. 554, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2462, 2512).
\item \textsuperscript{8}Congress elected not to adopt a remedial scheme unique to the ADA despite widespread concerns that disability discrimination claims "are different from other types of discrimination claims," Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035 (2d Cir. 1993), and that the remedies necessary to rectify such discrimination therefore may "differ in important ways from [those appropriate for] other types of discrimination," Fink, 881 F. Supp. at 1368 (quoting U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 48, 149 (1983)).
\item \textsuperscript{9}See Buchanan, 85 F.3d at 196, 200 (5th Cir. 1996) ("The remedies provided under the ADA are the same as those provided by Title VII . . . .") (citations omitted); Olds v. Alamo Group (KS), Inc., 889 F. Supp. 447, 449 (D. Kan. 1995) ("[T]he ADA incorporates the remedies and procedures of Title VII."); Houck v. City of Prairie Village, 912 F. Supp. 1428, 1434 (D. Kan. 1996) (indicating that the ADA "has incorporated by reference certain powers, remedies and procedures of Title VII").
\item \textsuperscript{11}See supra notes 16-17 and accompanying text.
\item \textsuperscript{12}See Outlaw v. City of Dothan, 3 Am. Disabilities Cas. (BNA) 939, 943 (M.D. Ala. 1993) (noting that "[p]unitive damages were not recoverable under any provision of . . . . the ADA" until 1991); Antol v. Perry, 4 Am. Disabilities Cas. (BNA) 441, 443 (W.D. Pa. 1995) (noting the contention that compensatory damages were unavailable in disability discrimination cases that arose prior to 1991), rev'd in part and aff'd in part on other grounds, 82 F.3d 1291 (3d Cir. 1996). See generally Buchanan, 85 F.3d at 200 (observing that in 1991 Congress "expanded the type of dam-
ultimately proved to be of no practical significance in disability discrimination cases.\textsuperscript{32}

Rectifying another omission in Title VII,\textsuperscript{33} a third major federal employment discrimination act,\textsuperscript{34} the Age Discrimination in Employment Act of 1967 ("ADEA"),\textsuperscript{35} prohibits employers from discriminating against persons forty years of age or over.\textsuperscript{36} Although Congress specifically declined to address the problem of age discrimination when it en-

\textsuperscript{32} As discussed infra notes 56-67, the limitation was eliminated by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which became effective on November 21, 1991. See United States v. Burke, 504 U.S. 229, 237 n.8 (1992). Although the ADA was enacted in 1990, "its provisions relating to employment discrimination did not take effect until July 26, 1992." Raya v. Maryatt Indus., 829 F. Supp. 1169, 1171 (N.D. Cal. 1993). Because the ADA does not apply retroactively, see O'Bryant v. City of Midland, 9 F.3d 421, 422 (5th Cir. 1993), there actually have been no employment discrimination cases cognizable under the ADA to which the Civil Rights Act of 1991 did not apply, see EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 n.5 (7th Cir. 1995) (noting that "the ADA became effective after the Civil Rights Act of 1991 went into effect").


\textsuperscript{34} See Robert Cavallaro, Note, \textit{Corporate Buyer Beware: Deficiencies in Directors' and Officers' Insurance for Employment Practices Liability}, 26 \textit{HOFSTRA L. REV.} 217, 226 (1997) (describing Title VII, the ADA and the ADEA as "the three federal anti-discrimination statutes"). There are, of course, other less-encompassing federal employment discrimination statutes, the most notable of which may be the Rehabilitation Act of 1973. \textit{See} 29 U.S.C. §§ 701-797 (1994). Like the ADA, the Rehabilitation Act prohibits disability discrimination in employment, but unlike the ADA (which extends to private as well as public employers), it applies "only to the federal government, government contractors, and recipients of federal assistance." Raya, 829 F. Supp. at 1174. Despite its more limited coverage, the survival issues discussed in this article obviously can arise under the Rehabilitation Act as well. \textit{See, e.g.,} Glanz v. Vernick, 750 F. Supp. 39 (D. Mass. 1990).


\textsuperscript{36} \textit{See} 29 U.S.C. §§ 623(a), 631(a) (1994). As originally enacted, the ADEA only protected persons between the ages of forty and sixty-five. \textit{See} Crozier v. Howard, 11 F.3d 967, 969 (10th Cir. 1993). The upper age limit for the ADEA's protected class was extended to seventy in 1978, and eliminated entirely in 1986. \textit{Id.; see also} Goodman v. Heitman Fin. Servs., 894 F. Supp. 1166, 1170 (N.D. Ill. 1995) ("While the statute originally limited such protection to workers between the ages of 40 and 65, a series of amendments uncapped the ADEA so that there is now no bright-line upper age limit . . . .") (citation omitted).
acted Title VII, the ADEA is unquestionably a product of the same civil rights revolution that prompted Title VII’s enactment.

Like the ADA, the ADEA contains no specific remedial provisions for the enforcement of its prohibitions. Unlike the ADA, the ADEA is not enforced through the adoption of Title VII’s remedial scheme, but instead through the selective incorporation of various Fair Labor Standards Act (“FLSA”) provisions.

37. See Lavery v. Marsh, 727 F. Supp. 728, 729 (D. Mass. 1989): During the 1964 floor debate over the bill that was to become Title VII, both the House of Representatives and the Senate considered amendments to the bill that would have barred employment discrimination on the basis of age as well as on the basis of race, color, religion, sex, and national origin. The amendments with regard to age discrimination were ultimately rejected, in part because Congress did not yet have enough information to make a considered judgment about the nature of age discrimination.

38. See supra note 19 and accompanying text. But cf. Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) (observing that the ADEA “is not a civil rights act”).


40. See supra note 27 and accompanying text.

41. See Cancellier v. Federated Dep’t Stores, 672 F.2d 1312, 1317 n.4 (9th Cir. 1982) (“The ADEA’s proscription against age discrimination is [not] enforced . . . through independent ADEA remedies.”). However, one provision of the ADEA authorizes “such legal or equitable relief as may be appropriate.” 29 U.S.C. § 626(b) (1994).

42. See supra notes 28-29 and accompanying text.

43. See Lorillard v. Pons, 434 U.S. 575, 584-85 (1978) (indicating that Congress “rejected” adoption of the Title VII remedial scheme “even while adopting Title VII’s substantive prohibitions”); Morelock v. NCR Corp., 546 F.2d 682, 687 (6th Cir. 1976) (“Although the prohibitory provisions of Title VII and the ADEA are in terms identical, the enforcement sections of these acts differ.”), vacated on other grounds, 435 U.S. 911 (1978).

44. 29 U.S.C. §§ 201-219 (1994 & Supp. I 1995). Congress passed the FLSA to protect workers from substandard wages by requiring the payment of a uniform minimum wage and additional compensation for overtime work to most individuals employed in interstate commerce. See id. §§ 206-207. See generally Stewart v. Region II Child & Family Servs., 788 P.2d 913, 917 (Mont. 1990) (observing that Congress passed the FLSA to “ensure a minimum living standard” for workers); Elkins v. Showcase, Inc., 704 P.2d 977, 987 (Kan. 1985) (“The expressed congressional purpose in passing the FLSA was to enable a substantial part of the American work force to maintain a minimum standard of living.”). For the author’s previous discussions of the FLSA, see Michael D. Moberly, Fair Labor Standards Act Preemption of “Public Policy” Wrongful Discharge Claims, 42 Drake L. Rev. 525 (1993), and Michael D. Moberly, Fair Labor Standards Act...
For example, when the ADEA has been violated, the FLSA provides for the recovery of unpaid wages and, if the employer's discriminatory conduct was willful, an additional, equal amount of liquidated damages. Other remedies not specifically authorized by the FLSA, such as front pay and prejudgment interest, also may be available in

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45. Section 7(b) of the ADEA provides for the enforcement of that Act in accordance with the powers, remedies and procedures provided for in the FLSA. See 29 U.S.C. § 626(b) (1994); see also Kelly v. American Standard, Inc., 640 F.2d 974, 977-78 (9th Cir. 1981) ("[The ADEA] is enforced through express incorporation of the remedial rights and procedures of the Fair Labor Standards Act . . . ."); Morelock, 546 F.2d at 687 ("The enforcement provisions of . . . the ADEA essentially follow those of the Fair Labor Standards Act . . . ."). See generally Slatin v. Stanford Research Inst., 590 F.2d 1292, 1295 (4th Cir. 1979) ("Congress rejected other avenues of enforcement in favor of selective adoption of FLSA enforcement provisions."). But see Gilchrist v. Jim Simons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986); EEOC v. Pape Lift, Inc., 115 F.3d 676 (9th Cir. 1997).

46. See 29 U.S.C. § 216(b). Damages under the ADEA "are deemed to be the 'unpaid minimum wages' or 'unpaid overtime compensation' referred to in § 216(b) of the FLSA." Fariss v. Lynchburg Foundry, 769 F.2d 958, 964 n.7 (4th Cir. 1985); see also Drez v. E.R. Squibb & Sons, Inc., 674 F. Supp. 1432, 1440 (D. Kan. 1987) ("Amounts owing to a person as a result of a violation of [the ADEA are] deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of . . . the Fair Labor Standards Act . . . .") (quoting 29 U.S.C. § 626(b)).

47. An employer's conduct is considered willful for purposes of the ADEA if it either knew or showed reckless disregard for whether its conduct was prohibited. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 614-17 (1993). For a recent academic consideration of the potential implications of this standard, see Jan W. Henkel, The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183 (1997).

48. See 29 U.S.C. §§ 216(b), 626(b) (1994). The characterization of these additional damages as "liquidated" has been described as a "mismarker," on the ground that they are more akin to punitive damages. See Schmitz v. Commissioner, 34 F.3d 790, 797 (9th Cir. 1994) (Trott, J., dissenting); see also Kelly, 640 F.2d at 979 ("The award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA.").

49. The FLSA is silent with respect to whether either front pay or prejudgment interest can be recovered in cases arising under that Act. See Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279, 283 (7th Cir. 1993) (characterizing front pay as a judicial "invention"); McClanahan v. Mathews, 440 F.2d 320, 324 (6th Cir. 1971) ("the Fair Labor Standards Act of 1938 makes no provision for interest on amounts recovered as restitution of unpaid back wages . . ."); cf. Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1231 (7th Cir. 1995) ("We cannot find any case in which front pay has been awarded under the Fair Labor Standards Act . . . .").

50. See McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986) ("All of the circuits that have decided the issue . . . have held that front pay is an available remedy in appropriate cases brought under the ADEA."). rev'd on other grounds by Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988).

51. However, "[t]he court of appeals is split as to whether an award of prejudgment interest is proper when a court awards liquidated damages to plaintiffs in ADEA suits." Burns v. Texas City Refining, Inc., 890 F.2d 747, 752 (5th Cir. 1989). For the author's previous consideration of this issue, see Michael D. Moberly, The Recoverability of Prejudgment Interest Under the ADEA After Thurston, 8 LAB. LAW. 225 (1992).
ADEA cases. However, as under Title VII and the ADA as originally enacted, neither compensatory nor punitive damages are recoverable under the FLSA or the ADEA.

Effecting yet another landmark change in employment discrimination law, Congress eventually broadened the remedies available under Title VII and the ADA, but not those available under the ADEA, by enacting the Civil Rights Act of 1991. As originally introduced in 1990, the primary purpose of this act was to negate the impact of sev-

52. The ADEA's provision for appropriate "legal or equitable relief" (see supra note 41 and accompanying text) does not appear in the FLSA. See Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1101 (11th Cir. 1987).

53. See supra notes 16-17, 30-32 and accompanying text.

54. See, e.g., Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 810 (8th Cir. 1982) ("[D]amages for pain and suffering have never been awarded under the FLSA."); Eggleston v. South Bend Community Sch. Corp., 858 F. Supp. 841, 853 (N.D. Ind. 1994) (observing that "compensatory damages are not recoverable under the FLSA"); Skrov v. Heiraas, 303 N.W.2d 326, 531-32 (N.D. 1981) (holding that punitive damages are unavailable under the FLSA); King v. J. C. Penney Co., 38 F.R.D. 649, 650 (N.D. Ga. 1973) ("The F.L.S.A. itself does not provide for the recovery of punitive damages, and this court is unaware of any judicial decision allowing punitive damages to be recovered.").

55. See, e.g., Bruno v. Western Elec. Co., 829 F.2d 957, 966 (10th Cir. 1987) ("[A]ll ... circuits that have [addressed the issue] deny punitive damages in ADEA cases."); Bailey v. Container Corp. of Am., 594 F. Supp. 629, 633 (S.D. Ohio 1984) ("[N]either compensatory nor punitive damages are available under the ADEA.").


57. See Lee v. Sullivan, 787 F. Supp. 921, 930 (N.D. Cal. 1992) ("We note that the 1991 Act does not authorize compensatory damages for age discrimination."); Morgan v. Servicemaster Co., 57 Fair Empl. Prac. Cas. (BNA) 1423, 1424 (N.D. Ill. 1992) (observing that "age" is not one of the types of discrimination the Civil Rights Act of 1991 was intended to "clarify"). Congress' failure to address age discrimination when it expanded the remedies available to other victims of employment discrimination has been criticized. See, e.g., Howard Eglit, The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark, 39 WAYNE L. REV. 1093, 1206 n.365 (1993).


eral recent Supreme Court decisions that had undermined existing employment discrimination laws, including Title VII. As ultimately enacted, however, the 1991 act went well beyond a restoration of prior law and, among other things, authorized the recovery of compensatory and punitive damages that had never previously been available in federal employment discrimination cases. Because the expanded remedies


61. See Browning v. AT&T Paradyne, 120 F.3d 222, 224 (11th Cir. 1997) (observing that Congress "was expressly seeking to overturn several Supreme Court decisions limiting the remedies available to victims of discrimination"); Canada v. Boyd Group, 809 F. Supp. 771, 779-80 (D. Nev. 1992) ("Congress' purpose in enacting the Civil Rights Act of 1991 was to strengthen the scope of federal civil rights protection that had been weakened by recent United States Supreme Court decisions . . ."); Stender, 780 F. Supp. at 1306 ("Congress' clear intention was to undo the effects of these cases, which it believed were wrongly decided, and to restore civil rights law to its previous state.").


63. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189 (9th Cir. 1998) ("While the Act was primarily designed to 'overrule' hostile Supreme Court decisions in order to make discrimination claims easier both to bring and to prove in federal courts, . . . it increased substantially the procedural rights and remedies available to Title VII plaintiffs in federal courts . . ."); Butts, 990 F.2d at 1407 ("Congress deliberately deleted all 'restore' language in drafting the 1991 version."); Canada, 809 F. Supp. at 780 (indicating that the purpose of the 1991 Act was to "restore and expand the rights of discrimination victims") (emphasis added); Reynolds v. Frank, 786 F. Supp. 168, 170 (D. Conn. 1992) (observing that the expansive purpose of the 1991 Act "contrasts [with] the language used in the 1990 Act, the stated purpose of which is 'restoring ... civil rights protections'") (quoting 1990 bill); David A. Catchart & Mark Snyderman, The Civil Rights Act of 1991, 8 LAB. L.J. 849, 850 (1992) (asserting that the 1991 act "reaches beyond a simple 'restoration' of prior laws").


65. See Burke, 504 U.S. at 239 ("Nothing in [the original] remedial scheme purport[ed] to recompense a Title VII plaintiff for any of the . . . traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages . . ."); Williams v. United States Gen. Servs. Admin., 905 F.2d 308, 311 (9th Cir. 1990) (observing that "emotional and punitive damages [were] not available under Title VII" as originally enacted); Taylor v. Central Pa. Drug & Alcohol Servs. Corp., 890 F. Supp. 360, 373 (M.D. Pa. 1995) ([Compensatory] damages are not available to plaintiffs under Title VII, [where] their claims arose prior to the . . . effective date of the 1991 Civil Rights Act.").
provided for in the 1991 act do not extend to ADEA cases, however, compensatory and punitive damages continue to be unavailable under that act.

As is typical in conventional state law tort actions, the remedies now available in Title VII and ADA cases include damages for the plaintiff's pain and suffering. The basic purpose of such an award is to compensate discrimination victims for the "physiological and psychological damages caused by the employer's unlawful conduct," although such an award may simultaneously serve an important deterrent function as well.

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68. See Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 484 (Ohio 1992) ("One of the elements of compensatory damages that is universally allowed in actions for personal injuries is the pain and suffering endured by the plaintiff as a result of the injury."); see also Myers v. Rollette, 439 P.2d 497, 502 (Ariz. 1968) (en banc) ("It is well established that pain and suffering are proper elements to consider in awarding damages in a negligence action for personal injuries."); In re Air Crash Disaster Near Chicago, Ill., 507 F. Supp. 21, 24-25 (N.D. Ill. 1980) (observing that "damages recoverable in a products liability action include conscious pain and suffering resulting from bodily injury").


70. Rogers v. Exxon Research & Eng'g Co., 404 F. Supp. 324, 329 (D.N.J. 1975) (age discrimination case), vacated and remanded, 550 F.2d 834 (3d Cir. 1977); cf. Hollen v. Sears, Roebuck & Co., 689 P.2d 1292, 1303 (Or. 1984) (en banc) (indicating that legal remedies under Title VII would "compensate[s] the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care").

71. See United States v. Burke, 504 U.S. 229, 250 (1992) (O'Connor, J., dissenting) ("The purpose of [Title VII] liability is . . . to compensate employees for injury they suffer and to 'eradicate discrimination throughout the economy.'") (citation omitted). See generally Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of damages that are compensatory—damages grounded in determinations of plaintiffs' actual losses."); Goad v. Macon County, Tenn., 730 F. Supp. 1425, 1431 (M.D. Tenn. 1989) ("The basic concept of compensatory damages serving as a deterrent to unlawful conduct as well as a compensation for the injuries is that the threat of compensating for the injuries will make the actor less inclined to perform the conduct.").
At common law, personal injury claims—of which employment discrimination claims may be considered examples—did not survive the death of the injured party. The precise origins of this doctrine (the Latin appellation of which is *actio personalis moritur cum persona*) are unclear. However, it appears to have been based at least in part upon the fact that acts now characterized as torts were originally treated as crimes. As a result, any damage recovery was premised upon a theory of vengeance, and the concept of “compensating” for the victim’s injuries was virtually unknown. Under that theory, once the victim
died, his need for vengeance (and therefore any right to recover damages) was also deemed to have expired.\textsuperscript{79}

As the conceptual underpinnings of tort law shifted from vengeance to compensation,\textsuperscript{80} the common law rule became the subject of increasing criticism.\textsuperscript{81} As a result, virtually all states have now enacted statutes,\textsuperscript{82} commonly known as survival statutes,\textsuperscript{83} abrogating the \textit{actio personalis} doctrine\textsuperscript{84} and allowing tort actions to continue upon the death of the victim.\textsuperscript{85}

Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224, 1238 (N.J. 1984) (O'Hern, J., concurring) ("At early common law . . . there was no measure of damages.").

\textsuperscript{79} See \textit{Inflight Explosion}, 778 F. Supp. at 630; \textit{Harrison}, 396 N.E.2d at 990; see also \textit{Canino}, 475 A.2d at 529 ("Since the recovery of damages was viewed as a matter of personal revenge between the victim and [the] wrongdoer, death erased the purpose of a civil action between them . . . . ").

\textsuperscript{80} See \textit{Thompson}, 319 N.W.2d at 405 (observing that "medieval notions of revenge . . . no longer have a place in our law[,] since compensation rather than punishment is now the essential purpose of any tort cause of action").

\textsuperscript{81} See, e.g., \textit{Canino}, 475 A.2d at 529 (asserting that the rule has "no foundation in principle"); \textit{Mayer}, 341 A.2d at 442 (noting previous characterization of the rule as "one of the least rational parts of our law") (authority and internal quotation marks omitted); Mattyasovszky v. West Towns Bus Co., 313 N.E.2d 496, 500 (Ill. Ct. App. 1974) (describing the rule as "harsh and unjust"); \textit{Publix Cab Co.}, 338 P.2d at 711 (referring to the rule's "lack of logic and soundness as a matter of social policy") (parentheses omitted); \textit{Gustafson}, 263 P.2d at 548 (Phipps, J., dissenting) (characterizing the rule as "an ancient and barbaric legal concept long since outworn"). See generally Mickelson v. Williams, 340 P.2d 770, 772 (Wash. 1959) ("The common-law rule as to the survival of tort actions has been the subject of most severe criticism.").

\textsuperscript{82} One court has observed that "the states generally used statutes (rather than judicial declaration) to abrogate the ancient common law rule against the survival of actions." Miller v. Apartments & Homes of N.J., Inc., 646 F.2d 101, 108 (3d Cir. 1981).

\textsuperscript{83} In this context, a survival statute is "a statute wherein the decedent's right to recover for a tort survives, and can be enforced by his executors, administrators, or heirs." Rice v. Vancouver S. S. Co., 60 F.2d 793, 794 (9th Cir. 1932); see also \textit{Sea-Land Servs. v. Gaudet}, 414 U.S. 573, 575 n.2 (1974) ("Survival statutes permit the deceased's estate to prosecute any claims for personal injury the deceased would have had, but for his death.").

\textsuperscript{84} See \textit{Parkerson}, 782 F.2d at 1451 ("Statutes allowing the survival of actions were intended to modify the traditional rule that an injured party's claim was extinguished upon the death of either party."); \textit{Thompson}, 319 N.W.2d at 406 ("The purpose of [a survival] statute [is] to alleviate in part the harsh results of the common law rule prohibiting the survival of any cause of action.").

\textsuperscript{85} See \textit{In re Inflight Explosion on Trans World Airlines, Inc.}, 778 F. Supp. 625, 631 (E.D.N.Y. 1991) ("The overwhelming majority of states have survival statutes . . . ."); \textit{rev'd on other grounds sub nom. Ospina v. Trans World Airlines, Inc.}, 975 F.2d 35 (2d Cir. 1992); Guyton v. Phillips, 532 F. Supp. 1154, 1165 (N.D. Cal. 1981) (observing that "most states have survival statutes"); \textit{disapproved on other grounds in Peraza v. Delameter}, 722 F.2d 1455, 1457 (9th Cir. 1984). But cf. \textit{Evans v. Twin Falls County}, 796 P.2d 87, 92 (Idaho 1990) ("[T]he Idaho legislature has not enacted any statute specifically abrogating the common law rule of non-survival of causes of action \textit{ex delicto} in cases where the victim dies before recovery."); \textit{Thompson}, 319 N.W.2d at 403 n.6 (observing that while "[a]lmost all statutes permit causes of action for injuries to property to survive . . . [only] approximately one-half of the states permit the survival of certain personal
Title VII, the ADA, and the ADEA\(^6\) are silent on this question,\(^87\) and there is no general federal survival statute.\(^88\) Thus, the state statutes provide the principal reference point in assessing the survival of most federal employment discrimination claims\(^89\) (ADEA claims are an exception),\(^90\) and generally apply to preserve those claims where the victim of the alleged discrimination has died.\(^91\)

Most state survival statutes reflect modern tort law’s emphasis...
upon the compensatory nature of damage awards. See, e.g., Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982) (observing "that survival statutes were designed in accordance with modern theories of tort law, which stress the compensatory rather than the punitive aspects of damages for any injury"); Moyer v. Phillips, 341 A.2d 441, 444 (Pa. 1975) ("The breadth of the [Pennsylvania survival] statute comprehends the modern theory of torts which is generally compensatory in nature.").

3. See, e.g., Greene v. Vantage S.S. Corp., 466 F.2d 159, 167 n.12 (4th Cir. 1972) ("For example, Virginia does not provide for recovery of the decedent's pain and suffering."); Denton v. Superior Court, 945 P.2d 1283, 1287 (Ariz. 1997) (noting that Arizona's survival statute "prevents recovery of pain and suffering damages"); Kirk v. Washington State Univ., 746 P.2d 285, 292 (Wash. 1987) (observing that damages for pain and suffering were at that time "expressly barred from recovery by the language of the [Washington] survival statute"). See generally Berry v. City of Muskogee, 900 F.2d 1489, 1506 (10th Cir. 1990) (observing that "some states may preclude, or limit, recovery for pain and suffering").


5. The limitations presumably apply in employment discrimination cases arising under state law. In California v. Home Fed. Sav. & Loan Ass'n, 51 Fair Empl. Prac. Cas. (BNA) 990, 992 (N.D. Cal. 1989), for example, the court held that damages for emotional distress are recoverable under the California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12966 (West 1992 & Supp. 1993), but that they do not survive the plaintiff's death under the California survival statute, CAL. CIV. PROC. CODE § 377.34 (West 1973 & Supp. 1999). The same analysis undoubtedly would apply to damages for pain and suffering, because "California courts have long held that emotional distress is a form of pain and suffering and thus actions based on emotional distress do not survive the death of the injured party." In re Air Crash Disaster at Sioux City, Iowa, No. MDL 817, 1991 U.S. Dist. LEXIS 18643, at *10 (N.D. Ill. Dec. 20, 1991).

6. See, e.g., Allred, 971 F. Supp. at 1398; cf. Glanz v. Vernick, 750 F. Supp. 39, 44-45 (D. Mass. 1990) (considering whether the application of a state statute "to allow the survival of compensatory, but not punitive, damages" in a Rehabilitation Act case was inconsistent with the compensatory and deterrent purposes of that federal statute). State survival statutes have also been challenged on state constitutional grounds, although such instances are rare. See Thompson v. Estate of Petroff, 319 N.W.2d 400, 402 (Minn. 1982). The few courts that have considered the issue have generally rejected state constitutional challenges to survival statutes that preclude recovery for a decedent's pain and suffering. See, e.g., Martin v. United Sec. Servs., 314 So. 2d 765, 767 (Fla. 1975); Harrington, 407 P.2d at 947-48.
This article explores the merits of that argument. It begins with a discussion of the Supreme Court's consideration of the interplay between federal civil rights law and state survival statutes, and particularly its seminal decision in *Robertson v. Wegmann.* The article then analyzes various cases that have considered whether state survival statutes precluding recovery for a decedent's pain and suffering are inconsistent with the compensatory and deterrent purposes of Title VII, the ADA, and other federal civil rights laws.

The article concludes that state survival statutes precluding recovery for pain and suffering may undermine federal deterrent objectives in cases where the discrimination victim is terminally ill or otherwise infirm, and perhaps also in those rare instances in which the employer's conduct causes or contributes to the victim's death. However, preclud-
ing recovery for a decedent’s pain and suffering is not inconsistent with federal law in other Title VII and ADA cases.\textsuperscript{105}

The article also briefly discusses how the survival analysis in ADEA cases differs from the survival analysis in Title VII and ADA cases.\textsuperscript{106} The article ultimately concludes that damages for pain and suffering would be likely to survive in all age discrimination cases if they were recoverable under the ADEA, while noting that there is nevertheless some basis for reaching a contrary conclusion.\textsuperscript{107}

II. THE SUPREME COURT’S CONSIDERATION OF THE INTERPLAY BETWEEN FEDERAL CIVIL RIGHTS LAW AND STATE SURVIVAL STATUTES

A. Jefferson v. City of Tarrant

In Jefferson v. City of Tarrant,\textsuperscript{108} the Supreme Court recently granted certiorari\textsuperscript{109} to review an Alabama Supreme Court decision\textsuperscript{110} holding that a state statute\textsuperscript{111} limiting the plaintiff’s recovery to punitive damages\textsuperscript{112} applied in a civil rights action\textsuperscript{113} in which the unlawful con-
duct resulted in the victim's death. However, the Court in Jefferson subsequently dismissed the writ of certiorari for want of jurisdiction after concluding that the state court's decision was not final.

Justice Stevens, dissenting from the dismissal of the writ, asserted that the state statutory damage limitations had no application because the damages recoverable in federal civil rights actions are governed by federal law. Justice Stevens acknowledged that state law may

Wrongful Death Act provides only for punitive damages, and compensation is not a factor in a wrongful death claim.


[The state law principles which govern survival of federal civil rights actions under 42 U.S.C. § 1983 are not applicable [in Title VII cases]. 42 U.S.C. § 1988 directs federal courts to refer to state law in deciding all matters which Section 1983 does not specifically address. Consequently, pursuant to federal statute, survival of federal civil rights actions is a matter of state law. [Title VII, however, do[es] not contain a provision similar to 42 U.S.C. § 1988. Therefore, the court must look to the federal common law.]

(Citations omitted.)

114. See Jefferson, 118 S. Ct. at 484. The state court held that "state law applies in § 1983 actions seeking recovery for wrongful death unless... it is found to unduly restrict the federal claim," and that the pertinent Alabama statute did not unduly restrict the § 1983 claim at issue in that case "merely because the statute" provides for recovery of only punitive damages. City of Tarrent, 682 So. 2d at 30 (citations omitted).

115. See Jefferson, 118 S. Ct. at 484. The federal statute requiring finality as a prerequisite to Supreme Court review states, in pertinent part, as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of... the United States.


116. Justice Stevens was of the view that because further litigation of the federal issue would have been futile, the Court's prior decision in Pennsylvania v. Ritchie, 480 U.S. 39 (1987)—from which he had also dissented—required the Court to treat the state court judgment in Jefferson as final. See Jefferson, 118 S. Ct. at 487-88 (Stevens, J., dissenting).

117. See id. at 488 (Stevens, J., dissenting); see also Frye v. Town of Akron, 759 F. Supp.
govern the survival of such actions, but maintained that where the action does survive, "additional state law limitations on the particular measure of damages are irrelevant."

**B. Jones v. Hildebrandt**

Although no other justice joined Justice Stevens's dissent in *Jefferson,* one federal judge has observed that now-retired Justice White, dissenting from dismissal of certiorari in another case, *Jones v. Hildebrandt,* had previously indicated that he also may be of the view that state law damage limitations do not apply in federal civil rights actions. In actuality, Justice White acknowledged that state law may be relevant in assessing the remedies available in such actions. However,

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130, 1326 (N.D. Ind. 1991) ("The availability of damages for constitutional rights violations is considered a question of federal law and is governed by federal standards."); cf. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969) ([B]oth federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes.").

118. See *Jefferson,* 118 S. Ct. at 488 (Stevens, J., dissenting). See generally *Hess v. Eddy,* 689 F.2d 977, 980 n.6 (11th Cir. 1982) ("In a civil rights damage action brought pursuant to § 1983, rights of survivorship are to be determined according to state law."); *O'Connor v. Several Unknown Correctional Officers,* 523 F. Supp. 1345, 1347 (E.D. Va. 1981) ("Many courts have held that state law governs the question of whether an action under § 1983 survives the death of the injured party . . . .").

119. *Jefferson,* 118 S. Ct. at 488 (Stevens, J., dissenting). But cf. *Berry v. City of Muskogee,* 900 F.2d 1489, 1503 (10th Cir. 1990) ("The Supreme Court has not directly considered the issue, but language in [Robertson v. Wegmann, 436 U.S. 584 (1978)] appears to encourage reference to state law in defining the scope and content of remedies available."); *Bass ex rel. Lewis v. Wallenstein,* 769 F.2d 1173, 1188 (7th Cir. 1985) (holding that courts in § 1983 actions are to "look to the most closely analogous state law to determine survivability and the appropriate measure of damages") (emphasis added).

120. However, at least one lower court judge has also suggested an approach whereby plaintiffs in civil rights cases would look to state survival statutes "as a means to bring [their] actions," while "appealing to federal common law on [the issue of] damages." *Sager v. City of Woodland Park,* 543 F. Supp. 282, 294 n.13 (D. Colo. 1982).

121. 432 U.S. 183 (1977). *Jones* involved a § 1983 claim asserted by the mother of a police shooting victim on her own behalf rather than as a representative of the decedent's estate. See *id.* at 183-84. The Court dismissed the writ of certiorari when the issue as framed during oral argument diverged from the question that had been raised in the petition for certiorari, which involved the extent to which state statutory damage limitations apply in § 1983 wrongful death actions. See *id.* at 184-89.

122. See *Sager,* 543 F. Supp. at 293 (citing *Jones,* 432 U.S. at 190 (White, J., dissenting)); see also *Bell v. City of Milwaukee,* 746 F.2d 1205, 1252 (7th Cir. 1984) (observing that "both the majority and the dissent in *Jones* questioned the applicability of state damage restrictions on a beneficiary's Section 1983 action where the deprivation of a [constitutional] right caused death").

123. See *Jones,* 432 U.S. at 190 (White, J., dissenting). For example, the Seventh Circuit has observed that "[s]tate damage limitations can represent a well-founded concern by the legislature that juries may over-compensate plaintiffs for . . . damages . . . which are inherently difficult to estimate," and that "[i]t is clear that the proper way to balance the interests of individual rights and the need for an individualized jury determination is to allow relevant state law to define the standard for the measure of damages in a § 1983 case."
his opinion in *Jones* also suggests that, at least in some cases, he might subscribe to Justice Stevens’s view.124

In particular, Justice White apparently was not persuaded that state law can limit the plaintiff’s recovery in a federal civil rights action “where the remedy provided under state law is inadequate to implement the purposes” of the pertinent federal statute.125 This observation may suggest that a state survival statute can expand,126 but not contract,127 the damages available in federal civil rights cases.128

C. Robertson v. Wegmann

Despite the views of Justices White and Stevens, many courts have rejected the conclusion that the survival of remedies in civil rights liti-
igation is governed by federal law, relying primarily upon the Supreme Court's decision in *Robertson v. Wegmann.* *Robertson* was a civil rights action premised upon prosecutions purportedly undertaken in bad faith by a state district attorney. The original plaintiff died while the case was pending, leaving no close surviving relatives. The executor of his estate then sought to be substituted as plaintiff in order to pursue the action on behalf of the estate.

However, the applicable Louisiana survival statute only permitted actions to survive in favor of a decedent's spouse, children, parents or siblings. Because there were no such surviving relatives in *Robertson*...
son, application of the state statute would have resulted in abatement of the action. Both the trial and appellate courts concluded that such a result would be inconsistent with federal law, and therefore purported to establish a federal common law rule that would allow the decedent’s federal claim to survive.

The Supreme Court granted certiorari and reversed, applying the Louisiana statute to bar the decedent’s federal claim. The Court began by noting that because federal law is silent on the issue, the survival of federal civil rights claims is generally determined by reference to analogous state law, except where application of the pertinent state law—in this case the Louisiana survival statute—would be inconsistent with federal law.

The Court explained that in determining whether a state statute is inconsistent with federal law, courts must look not only to the language...
of the pertinent federal statute,\textsuperscript{149} but also the policies underlying the statute.\textsuperscript{150} The Court then noted that the principal policies underlying the federal civil rights statute at issue in that case, 42 U.S.C. § 1983,\textsuperscript{151} are (1) compensating persons injured by deprivations of their federal rights, and (2) deterring abuses of authority by individuals acting unlawfully under color of state law.\textsuperscript{152}

The Court held that application of the Louisiana survival statute was not inconsistent with federal law merely because it caused the plaintiff to lose the litigation,\textsuperscript{153} noting that there is no basis for requiring compensation of an individual suing as executor of a decedent’s estate.\textsuperscript{154} The Court went on to hold that the fact that a particular action might abate also would not undermine § 1983’s role as a deterrent,\textsuperscript{155} at

\begin{itemize}
  \item[150.] See Robertson, 436 U.S. at 590.
  \item[151.] See Robertson, 436 U.S. at 590-91. The Ninth Circuit has observed that “while perhaps not the prominent purpose, punishment is [also] a permissible purpose of § 1983 liability.” Larez v. City of Los Angeles, 946 F.2d 630, 648 (9th Cir. 1991); cf. Sager v. City of Woodland Park, 543 F. Supp. 282, 296 n.16 (D. Colo. 1982) (referring to “a third purpose under § 1983—retribution”).
  \item[152.] See Robertson, 436 U.S. at 593. The Court explained:
    
    That a federal remedy should be available . . . does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. . . . If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

  \textit{Id.}

  \item[154.] See id. at 592. In other words, § 1983’s compensatory purpose was not undermined by the Louisiana statute because the plaintiff in Robertson was not within the class of persons protected by § 1983. See Sager, 543 F. Supp. at 295 (observing that the Court in Robertson concluded that “§ 1983’s policy of compensating injured persons would not be undermined by Louisiana’s survival law since mere executors are not truly injured parties pursuant to § 1983”). But cf. Ascani v. Hughes, 470 So. 2d 207, 209 (La. Ct. App. 1985) (noting that “federal statutory law does not address . . . who the injured parties are when the victim is killed”).
  \item[155.] The Court found “nothing in § 1983 or its underlying policies to indicate that a state
least in cases where the conduct at issue did not cause the victim's death.156

The Court explained that because the Louisiana statute permitted most actions to survive the death of the injured party,157 even individuals contemplating illegal activity who were familiar with the statute would be cognizant of their potential liability under federal law.158 And given the virtual impossibility of purposely selecting victims who would subsequently die from unrelated causes159 and leave no surviving relatives with standing to pursue their claims,160 application of the Louisiana survival statute was unlikely to have even a "marginal influence" on future behavior.161 The Court therefore held that the statute precluded the plaintiff's claim, noting as a general proposition that state survival statutes should apply in federal civil rights actions unless they have an "independent adverse effect on," and are generally "inhospitable" to, the federal policies at issue.162

Robertson did not involve a state statutory limitation on the remedies available in federal civil rights actions.163 Indeed, claims for compensatory damages, including pain and suffering, clearly survive under law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." Robertson, 436 U.S. at 590.

156. See id. at 592. One court has stated, somewhat exaggeratedly, that the Robertson Court "repeatedly emphasized that its decision to apply the Louisiana statute to the detriment of the plaintiff's case might be inappropriate in cases where the alleged misconduct caused the plaintiff's death." Weeks v. Benton, 649 F. Supp. 1297, 1306 n.8 (S.D. Ala. 1986); cf. McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (stating that the Robertson Court "pointedly distinguished a section 1983 claim for a deprivation of federally protected rights that caused the decedent's death").

157. See Robertson, 436 U.S. at 591, 592, 594; see also Sager, 543 F. Supp. at 295 ("[T]he Robertson court held that § 1983's policy of deterring abuses of power by those acting under color of state law would not be thwarted by appeal to Louisiana state law since most people do not die unsurvived by family and, therefore, most actions would survive the plaintiff's death.").

158. See Robertson, 436 U.S. at 593 n.10.

159. See id. at 593 n.10 (dismissing the suggestion that state officials could "deliberately . . . select as victims only those persons who would die before conclusion of the § 1983 suit for reasons entirely unconnected with the official illegality") (parentheses omitted).

160. See id. at 593 & n.10 (noting that the § 1983 claim abated because the victim of the constitutional deprivation "was not survived by one of several close relatives" specified in the state statute); see also Williams v. City of Oakland, 915 F. Supp. 1074, 1078 (N.D. Cal. 1996) (asserting that the § 1983 claim in Robertson abated "only because the plaintiff had no next of kin survivors").

161. See Robertson, 436 U.S. at 592 n.10.

162. See id. at 594.

Thus, although the reasoning in Robertson may be instructive in analyzing survival statutes that preclude recovery for a decedent’s pain and suffering, the case is not dispositive of whether such statutes are inconsistent with federal law.

III. THE APPLICATION OF ROBERTSON IN TITLE VII, ADA AND § 1983 EMPLOYMENT DISCRIMINATION CASES INVOLVING STATE SURVIVAL STATUTES PRECLUDING RECOVERY FOR PAIN AND SUFFERING

A. The Colorado Approach: Pain and Suffering Damages Can Be Precluded

1. Rosenblum v. Colorado Department of Health

In Rosenblum v. Colorado Department of Health, an insulin-dependent diabetic brought suit against her former employer under the ADA. She alleged that the employer unlawfully failed to accommodate her susceptibility to stress by providing “a non-hostile, harass-

164. See Thomas v. Frederick, 766 F. Supp. 540, 560-62 (W.D. La. 1991); Caldera v. Eastern Airlines, Inc., 529 F. Supp. 634, 640 (W.D. La. 1982). The Supreme Court itself noted that the Louisiana statute is in some respects more favorable to survivors than the survival statutes of other states. See Robertson, 436 U.S. at 591 (observing that “certain types of actions that would abate automatically on the plaintiff’s death in many States... would apparently survive in Louisiana”).


166. See Garcia, 49 Cal. Rptr. 2d at 583. See generally Weeks v. Benton, 649 F. Supp. 1297, 1308 (S.D. Ala. 1986) (“A number of... courts have held that restrictions on recoverable damages in state... survival statutes are inconsistent with federal law and therefore not applicable in § 1983 actions.”).


168. See id. at 1407.

169. See id. at 1405. One court that declined to adopt “a per se rule that insulin-dependent diabetes is a disability under the ADA” nevertheless observed that the disease “as a practical matter may always be found to be disabling.” Baert v. Euclid Beverage, Ltd., 149 F.3d 625, 631 (7th Cir. 1998). But see Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (“In order to have a disability under the ADA, one must have a physical or mental impairment that substantially limits one or more major life activities. ... [A]n insulin-dependent diabetic who takes insulin could perform major life activities and would therefore not be limited.”).

170. As a general proposition, the ADA makes it unlawful for an employer to fail to make a
When the plaintiff died while the action was pending, the employer sought a ruling that her personal representative was precluded from recovering for the plaintiff’s pain and suffering because such damages are excluded from the recovery available under the Colorado survival statute.

Because the ADA does not address the survival issue, the Rosenblum court noted that under 42 U.S.C. § 1988, the right to recover for the plaintiff’s pain and suffering was governed by the Colorado statute unless application of that statute would be inconsistent with federal law. It then noted that the Colorado statute was not inconsistent with the specific language of the ADA, because the ADA “does not provide for reasonable accommodation to the ‘known physical or mental limitations of an otherwise qualified individual with a disability.’” 42 U.S.C. § 12112(b)(5)(A) (1994). For the author’s recent consideration of the ADA’s accommodation obligation, see Michael D. Moberly, Letting Katz Out of the Bag: The Employer’s Duty to Accommodate Perceived Disabilities, 30 ARIZ. ST. L.J. 603 (1998).

The court observed that “[s]tress has a particularly adverse effect on diabetics.” Rosenblum, 878 F. Supp. at 1406 n.2; cf. Sneed v. Montgomery Hous. Auth., 956 F. Supp. 982, 985 (M.D. Ala. 1997) (discussing doctor’s report that stress is “harmful” to an individual with diabetes).

Rosenblum, 878 F. Supp. at 1408; cf. Gilday v. Mecosta County, 124 F.3d 760, 761 (6th Cir. 1997) (discussing ADA plaintiff’s contention that “his diabetes constitutes a disability [under the ADA] and . . . his employer should have granted his request for the reasonable accommodation of transferring him to a less chaotic station”).

See Rosenblum, 878 F. Supp. at 1405.

After the original plaintiff’s death, her daughter was substituted as the plaintiff in her capacity as the decedent’s personal representative. See id. As in the court’s opinion, however, references to the “plaintiff” in this article are to the decedent, and not to her personal representative.

See id.

See id. at 1408.

See id. at 1409 (citing COLO. REV. STAT. § 13-20-101(1) (West 1994)). Subject to certain specific exceptions not relevant here, the Colorado statute provides for the survival of “[a]ll causes of action.” COLO. REV. STAT. § 13-20-101(1); see also Espinoza v. O’Dell, 633 P.2d 455, 466 (Colo. 1981) (“[B]y [the] statute’s express terms, with the exception of defamation, all tort actions survive the death of the injured party.”), cert. dismissed, 456 U.S. 430 (1982). However, the statute also states that the recovery available in personal injury actions “shall not include damages for pain, suffering, or disfigurement.” COLO. REV. STAT. § 13-20-101(1); cf. Goldsmith v. Learjet, Inc., No. 93-1475-JTM, 1997 U.S. Dist. LEXIS 2273, at *4 (D. Kan. Feb. 7, 1997) (observing that “under Colorado law, damages in a survival action premised on personal, tortious injury are limited to economic damages”).


See Rosenblum, 878 F. Supp. at 1408 (citing Robertson v. Wegmann, 436 U.S. 584, 588-89 (1976)).

As a general proposition, the analysis of any ADA issue begins with the statutory language. See Sutton v. United Air Lines, Inc., 130 F.3d 893, 898 (10th Cir. 1997), cert. granted, 119
address the availability of damages after the plaintiff’s death.”

Citing Robertson v. Wegmann, the court also concluded that application of the state statute would not be inconsistent with the policies underlying the ADA, which it described as deterrence and compensation. Because the Court in Robertson held that the complete abatement of the action at issue in that case was not inconsistent with the similar policies underlying § 1983, the Rosenblum court held that the plaintiff was precluded from recovering damages for pain and suffering under the terms of the Colorado survival statute.

2. Reactions to Rosenblum

The analysis in Rosenblum has been cited with approval elsewhere. In Allred v. Solaray, Inc., for example, the court relied on Rosenblum to hold that the plaintiff’s ADA claim was barred by the Utah survival statute. Although the survival statute at issue in Allred—like the one at issue in Rosenblum—precludes recovery for a de-

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181. Rosenblum, 878 F. Supp. at 1409; cf. Booth, supra note 102, at 289 (urging Congress to enact a “general survival statute” that would apply to “federal enactment[s] such as the ADA”).
182. 436 U.S. 584 (1978); see supra notes 129-66 and accompanying text.
183. See Rosenblum, 878 F. Supp. at 1409. See generally Robertson, 436 U.S. at 590 (“In resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at ‘the policies expressed in [them]’.”) (citation omitted).
184. See Rosenblum, 878 F. Supp. at 1409; see also Allred, 971 F. Supp. at 1398 (discussing “the ADA’s policies of deterrence and victim compensation”).
185. See Rosenblum, 878 F. Supp. at 1409 (discussing Robertson); see also Glanz v. Vernick, 750 F. Supp. 39, 44 (D. Mass. 1990) (“The analysis in Robertson indicates that the Supreme Court would not usually consider a state law allowing abatement of a cause of action to be ‘inconsistent’ with a federal civil rights statute.”).
186. See Rosenblum, 878 F. Supp. at 1409. A state statutory limitation on damages obviously is less restrictive than a state statutory requirement that the entire action abate. See Brown v. Morgan County, 518 F. Supp. 661, 665 (N.D. Ala. 1981). The district court that decided Rosenblum had previously observed, for example, that “the fact that the damages might well be limited under the [Colorado] survival statute does not require that the action itself be dismissed.” Salazar v. Dowd, 256 F. Supp. 220, 223 (D. Colo. 1966).
187. See, e.g., Allred, 971 F. Supp. at 1398-99; see also Doore, supra note 19, at 393 (“Because Rosenblum’s estate was able to pursue pre-death earnings, the deterrence policy underlying the ADA was arguably preserved.”).
188. 971 F. Supp. 1394 (D. Utah 1997).
189. See id. at 1396, 1398-99; see also Doore, supra note 19, at 394 (characterizing Rosenblum and Robertson as “the cases upon which the Allred court relied[d] to determine that abatement of [the victim’s] claim [was] not inconsistent with the policies underlying the ADA”).
190. See Allred, 971 F. Supp. at 1398.
cendent’s pain and suffering, the court in Allred went even further, holding that the plaintiff’s ADA claim was precluded entirely by the state statute. While this holding is distinct from that in Rosenblum, there is little doubt that, if faced with the issue, the Allred court would have applied the state survival provision precluding recovery for the decedent’s pain and suffering to the plaintiff’s ADA claim.

However, that result, and specifically the holdings in Rosenblum and Allred, have been characterized as unfortunate on the ground that state survival statutes precluding recovery for a decedent’s pain and suffering are inconsistent with the provision of the Civil Rights Act of 1991 authorizing recovery for pain and suffering in ADA cases. In any event, there appears to be at least one circumstance in which the application of a state survival statute to preclude recovery for a discrimination victim’s pain and suffering might interfere with an important ADA objective.

Specifically, the Court in Robertson v. Wegmann indicated that the deterrent purposes underlying federal civil rights law would not be undermined by the application of a state survival statute in cases in which the victim’s death was an intervening circumstance because de-

191. See Bills v. United States, 857 F.2d 1404, 1406-07 (10th Cir. 1988); Kynaston v. United States, 717 F.2d 506, 510-12 (10th Cir. 1983); Doore, supra note 19, at 376 n.42.
192. See Doore, supra note 19, at 393 (“Rather than posing the issue addressed in Rosenblum—whether restricting recovery . . . is inconsistent with the ADA—Allred poses the question of whether complete extinguishment of a claim . . . is inconsistent with the policies underlying the ADA.”) (footnote omitted).
193. See Allred, 971 F. Supp. at 1398.
194. See Doore, supra note 19, at 394 (asserting that Rosenblum and Allred are “easily distinguished”).
195. See Allred, 971 F. Supp. at 1396 (“In addition to punitive damages, [the plaintiff] sought . . . damages for emotional pain and suffering . . . . To determine whether ADA claims for such relief survive the death of the plaintiff, courts look to the state’s most appropriate survival statute.”).
196. See Booth, supra note 102, at 286; Doore, supra note 19, at 371; cf. id. at 390 (stating that “the Allred court’s reasoning is flawed”).
198. See Booth, supra note 102, at 285-286. But cf. Haluch, supra note 102, at 741 (“The Rosenblum court’s analysis does not always result in a negative outcome for an ADA plaintiff’s representatives.”).
199. One commentator has asserted that “[e]xcluding pain and suffering damages in . . . survival actions is always inconsistent with the [federal] policy of compensation.”, supra note 149, at 236 (emphasis added). But see Jones v. George, 533 F. Supp. 1293, 1305 (S.D. W. Va. 1982) (concluding that the “policy . . . of compensating the victim . . . is not in issue” where the victim has died); Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981) (“The policy of compensation is not a factor in death cases . . . .”)
201. See Bell v. City of Milwaukee, 746 F.2d 1205, 1239 (7th Cir. 1984) (characterizing Rob-
fendants are unlikely to be able to select as victims persons who will subsequently die from unrelated causes. That reasoning is not easily extended to ADA cases in which the disability at issue involves a terminal illness, and may not apply in certain other contexts as well, such as discrimination cases in which the victim is quite elderly or otherwise infirm.

Employers in these situations may be particularly inclined to discriminate against their employees, and to delay any ensuing litigation in order to minimize their potential exposure, if a potentially applicable survival statute may result in the abatement of the victim’s claims. However, these perverse incentives may also arise if the victim’s death

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202. See Robertson, 436 U.S. at 392 & n.10.
203. See, e.g., EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571, 572 (N.D. Ill. 1993) (finding that the defendant employer had violated the ADA by "discriminat[ing] against [the plaintiff] on the basis of his disability, terminal cancer"), aff’d in part and rev’d in part, 55 F.3d 1276 (7th Cir. 1995). See generally Booth, supra note 102, at 290 (referring to the "large number of terminally ill plaintiffs ... who seek to recover under the ADA for discrimination suffered as a result of their diseased status").

204. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) (observing that declining health “sometimes accompany[es] advancing age”); Caraballo v. South Stevedoring, Inc., 932 F. Supp. 1462, 1463-64 (S.D. Fla. 1996) (describing employee in “failing health” who died while his ADA and ADEA claims were pending). See generally Felix Shafir, Comment, Flawed Assumptions: A Critique of Garcia v. Superior Court of Los Angeles, 93 Nw. U. L. Rev. 301, 342 (1998) (“Civil rights actions... often involve the elderly, impoverished, or infirm ...

205. See, e.g., Glanz v. Vemick, 750 F. Supp. 39, 45 (D. Mass. 1990) (“Given the high mortality of AIDS patients,... [employers] may in fact feel free to discriminate against them, taking sanctity in the knowledge that the... cause of action will likely abate.”); Oliver v. United States Army, 758 F. Supp. 484, 485 n.1 (E.D. Ark. 1990) (discussing Glanz); LeBoff, supra note 149, at 243 (indicating that employers “could be heedless of the civil rights of any person likely to die prior to the conclusion of a... trial”); Doore, supra note 19, at 392 (“Knowing that the victim has an illness to which the victim likely will succumb before the claim is adjudicated, a wrongdoer may discriminate at will.”).

206. One court has observed that “the ADEA’s framers... were concerned that delay would prejudice the claims of older plaintiffs.” Burns v. Equitable Life Assurance Soc’y, 696 F.2d 21, 24 (2d Cir. 1982); see also Caraballo, 932 F. Supp. at 1463 (describing an action involving ADA and ADEA claims that was delayed by “months of procedural roadblocks”); Doore, supra note 19, at 395 (“if... claims do not survive, defendants may be encouraged to manipulate the system and drag out litigation until... the plaintiffs succumb to old age or their illnesses.”); Booth, supra note 102, at 286-87 (“Unfortunately, due to the high mortality rate for... plaintiffs [with HIV or AIDS], combined with delays in the federal docket, many may not live to see their ADA claims fully adjudicated.”).

207. See Glanz, 750 F. Supp. at 45; Oliver, 758 F. Supp. at 485 n.1.
208. See Glanz, 750 F. Supp. at 45; Doore, supra note 19, at 393-94; cf. Burns, 696 F.2d at 24 n.2 (stating that Congress “wanted ADEA enforcement to be... expeditious”). See generally Doore, supra note 19, at 395 (“For the elderly, sick, and dying, abatement of claims has the unfortunate effect of not ensuring that private and public actors have any deterrent to breaking the civil rights laws—the very laws enacted to protect the rights of the elderly and disabled.”).
would merely eliminate the prospect of an award for pain and suffer-
ing. Thus, the Robertson Court’s conclusion that the state survival
statute at issue in that case did not inhibit deterrence does not appear
to apply by analogy in these circumstances.

In short, the application of a state survival statute precluding re-
covery for pain and suffering in these situations could have the effect of
promoting discrimination against individuals with terminal or poten-
tially terminal conditions. In Glanz v. Vernick, for example, the
court relied on state survival law to permit recovery for the decedent’s
pain and suffering in a federal disability discrimination case. Citing
and quoting from Robertson, the court explained that the availability
of such damages is necessary to vindicate the decedent’s rights and
eliminate any incentive employers and others might have to discrimi-
nate against those with high mortality rates.

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209. See, e.g., In re Guardianship of Denton, 945 P.2d 1283, 1288 (Ariz. 1997) (observing that
where the plaintiff in a case in which a state survival statute precludes an award of pain and suffer-
ing is nearing the end of life, the defendant has "a great incentive to delay litigation until the victim
dies"). See generally LeBoff, supra note 149, at 243 ("A survival statute that prevents significant
recovery by any survivor offers little or no protection for the elderly, terminally ill, and others un-
likely to live for the several years a... suit can take. [Employers] could violate these people’s civil
rights at will and with very little fear of liability.").

210. See Robertson, 436 U.S. at 592.

211. See, e.g., Doore, supra note 19, at 391 ("In Robertson, the Court determined that the de-
terrence goal of 42 U.S.C. § 1983 is not undermined except by a stretch of the imagination. How-
ever, in the situation [in which the victim is terminally ill], that stretch is significantly less tenu-
ous.") (footnotes omitted); cf. LeBoff, supra note 149, at 243 ("[T]he implausible hypothetical laid
down by the Court in Robertson becomes far more real under a state survival statute severely re-
stricting what damages are recoverable.").

212. See Booth, supra note 102, at 287.


214. The state statute at issue in Glanz was the Massachusetts survival statute. See MASS.
GEN. LAWS ch. 228, § 1 (1996).

215. See Glanz, 750 F. Supp. at 43-44; see also Gaudette v. Webb, 284 N.E.2d 222, 224
(Mass. 1972) (holding that "a cause of action [for conscious pain and suffering] would survive [the
victim’s] death by virtue of [the Massachusetts survival statute]"); Barbe v. Drummond, 507 F.2d
794, 798 n.3 (1st Cir. 1974) (observing that the Massachusetts survival statute “keeps... an action
for pain and suffering viable despite the death of the tort victim”).

216. Glanz arose under the Rehabilitation Act. See Glanz, 750 F. Supp. at 40. Significantly,
“Congress intended that Rehabilitation Act precedent be considered by the courts in interpreting
the ADA.” Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 676 n.5 (1st Cir. 1995) (citing 42
U.S.C. § 12201(a) (1994)); see also Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995) (observing
that the ADA “codified much of the case law... developed under the Rehabilitation Act”).

217. See Glanz, 750 F. Supp. at 44-45.

218. Although Glanz itself was not an employment case, the Rehabilitation Act clearly ex-
tends to disability discrimination in employment. See Prewitt v. United States Postal Serv., 662
F.2d 292, 302 (5th Cir. 1981).

219. See Glanz, 750 F. Supp. at 45. The Supreme Court has likewise indicated, without elabo-
B. The California Court of Appeal's View: Pain and Suffering Damages Can Sometimes Be Precluded

1. County of Los Angeles v. Superior Court

In County of Los Angeles v. Superior Court, the California Court of Appeal reached a result contrary to that in Rosenblum v. Colorado Department of Health. The plaintiff in County of Los Angeles brought suit under § 1983 alleging sex discrimination and sexual harassment in connection with her employment. The plaintiff died in an unrelated automobile accident while the action was pending, and her personal representative then pursued the action on her behalf in accordance with the terms of the California survival statute.

The trial court held that the decedent's claim for emotional distress survived her death despite the California survival statute's exclusion of damages for pain and suffering. The employer then petitioned the Court of Appeal for a writ directing the trial court to vacate that ruling, relying on the appellate court's intervening ruling in Garcia v. Superior Court that the California survival statute's preclusion of re-

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222. See County of Los Angeles, 58 Cal. Rptr. 2d at 359. Although Title VII is the principal federal statute redressing sex discrimination in employment, see Raines v. Shoney's, Inc., 909 F. Supp. 1070, 1081 (E.D. Tenn. 1995), such claims are also cognizable under § 1983 when the employer is a state governmental entity, see Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1112 (9th Cir. 1991).
223. See County of Los Angeles, 58 Cal. Rptr. 2d at 359. "California law ... permits survival actions to be brought either by the personal representative of the estate of the deceased or by the deceased's heirs." Falcon v. Richmond Police Dep't, No. C 97-2436 CAL(PR), 1998 U.S. Dist. LEXIS 17308, at *10 (N.D. Cal. Oct. 30, 1998). See generally Robertson v. Wegmann, 436 U.S. 584, 591-2 n.7 (1978) ("For those actions that do not abate automatically on the plaintiff's death, most States apparently allow the personal representative of the deceased to be substituted as plaintiff.").
225. See County of Los Angeles, 58 Cal. Rptr. 2d at 359.
226. 49 Cal. Rptr. 2d 580 (Ct. App. 1996); see infra notes 241-72 and accompanying text.
covery for the decedent’s pain and suffering is not inconsistent with the policies underlying § 1983.\textsuperscript{228}

The \textit{County of Los Angeles} court began its analysis\textsuperscript{229} by acknowledging that under \textit{Garcia}, where a federal civil rights violation causes the victim’s death, the remedies available to the victim’s survivors do not include damages for the victim’s pain and suffering.\textsuperscript{230} The issue in \textit{County of Los Angeles} was whether the same result is appropriate where (as undoubtedly is true in most employment discrimination cases) the victim’s death is unrelated to the employer’s conduct.\textsuperscript{231}

The court ultimately concluded that damages for pain and suffering are recoverable in the latter situation\textsuperscript{232} because application of the California survival statute in such cases would be inconsistent with the federal compensatory objective.\textsuperscript{233} The court rejected the contention that the Supreme Court’s decision in \textit{Robertson v. Wegmann}\textsuperscript{234} compelled a different outcome,\textsuperscript{235} even though the victim’s death in \textit{Robertson} was also unrelated to the unlawful conduct that had been alleged.\textsuperscript{236}

In reaching this conclusion, the California Court of Appeal relied upon that portion of \textit{Robertson} stating that abatement of a particular claim “should not ‘itself’ be sufficient” to compel the conclusion that a state survival statute is inconsistent with federal law.\textsuperscript{237} The holding in


\textsuperscript{228} \textit{See Garcia}, 49 Cal. Rptr. 2d at 586-87.

\textsuperscript{229} The procedural history of the \textit{County of Los Angeles} case is more complex than this abbreviated discussion suggests. Relying on \textit{Garcia}, the Court of Appeal initially issued an alternative writ, but subsequently concluded that \textit{Garcia} was not dispositive and, believing it had therefore acted improvidently, discharged the writ and denied the employer’s petition. \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 359-60. However, the California Supreme Court granted a petition for further review and, also citing \textit{Garcia}, directed the Court of Appeal to vacate its order denying the employer’s petition, issue another writ, and hold argument. \textit{See County of Los Angeles v. Los Angeles County Superior Court}, No. S053930, 1996 Cal. LEXIS 4695, at *1 (Cal. Aug. 21, 1996). The Court of Appeal complied, and ultimately issued the opinion discussed here. \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 360. That decision in turn was recently reversed by the California Supreme Court. \textit{See County of Los Angeles v. Superior Court}, 981 P.2d 68 (Cal. 1999).

\textsuperscript{230} \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 359 (citing \textit{Garcia}).

\textsuperscript{231} \textit{See id.} at 359-60.

\textsuperscript{232} \textit{See id.} at 360.

\textsuperscript{233} \textit{See id.} at 361.

\textsuperscript{234} 436 U.S. 584 (1978).

\textsuperscript{235} \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 361.

\textsuperscript{236} \textit{See Robertson}, 436 U.S. at 594.

\textsuperscript{237} \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 361 (quoting \textit{Robertson}, 436 U.S. at 592-3); \textit{see also} \textit{Weeks v. Benton}, 649 F. Supp. 1297, 1305 (S.D. Ala. 1986) (“The fact that the appli-
Robertson, the California court maintained, thus was limited to situations in which the pertinent survival statute is not generally inhospitable to survival, and has no independent adverse impact on the policies underlying the federal civil rights statute at issue. In contrast to the statute at issue in Robertson, the court went on to hold, the California survival statute is inhospitable to § 1983 claims where the victim's death is unrelated to the employer's conduct because its application in such a case may leave the victim's survivors with no meaningful remedy.

2. Garcia v. Superior Court

In reaching that result, the County of Los Angeles court specifically distinguished its earlier decision in Garcia v. Superior Court, a § 1983 action brought by the decedent's sister in her capacity as personal representative of his estate alleging that he had died as a result of excessive force inflicted by police officers during his arrest. The trial court in Garcia struck the plaintiff's claim for pain and suffering damages.4 The plaintiff then sought appellate review, arguing that the California survival statute is inconsistent with federal law. She contended that she was entitled to recover for pain and suffering experienced by the decedent prior to his death in order to effectuate the federal policies at issue in that case.

The Garcia court rejected that argument, concluding among other
things that § 1983’s deterrent objective was adequately served by the availability of punitive damages. In particular, the court noted that the availability of such damages rebutted any contention that the unavailability of pain and suffering damages would create an incentive for defendants to kill rather than merely injure their victims. The court explained:

We are not persuaded by the hypothetical example of a legally knowledgeable actor calculating that he would incur lesser liability by killing the victim than by injuring the victim. If we nevertheless indulge in that assumption, we must also attribute to the actor the knowledge that . . . a jury could punish such conduct with huge exemplary damages.

Although the Garcia court did not specifically analyze the potential “compensatory” impact of a punitive damage award, there is support for the conclusion that, in cases where the victim is deceased, punitive damages not only serve as an effective deterrent, but also serve whatever compensatory function might have been served by an award for

246. See id. at 585. Punitive damages are recoverable under § 1983 in appropriate circumstances. See, e.g., Carlson v. Green, 446 U.S. 14, 22 (1980). But cf. Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (“To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”).

247. Unlike damages for pain and suffering, punitive damages survive the victim’s death under California law. See Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1355 (N.D. Cal. 1997) (“California law permits a decedent’s heirs or successors to recover . . . punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived.”); Roman v. City of Richmond, 570 F. Supp. 1554, 1557 (N.D. Cal. 1983) (observing that “punitive damages are recoverable in a survival action” in California).

248. See Garcia, 49 Cal. Rptr. 2d at 585-86.

249. See id. at 586. See generally Larez v. City of Los Angeles, 946 F.2d 630, 648 (9th Cir. 1991) (observing that “deterrence is a primary, and common, purpose of both § 1983 liability and punitive damages”); Thomas v. Frederick, 766 F. Supp. 540, 561 (W.D. La. 1991) (“The availability of punitive damages is central to the goal of deterrence inherent in § 1983 cases.”).

250. The court instead observed that “[t]he deterrent purpose of [§ 1983] is satisfied . . . by the fact that [the state survival statute] expressly allows punitive damages the decedent would have been entitled to recover had he survived.” Garcia, 49 Cal. Rptr. 2d at 585. This implicit distinction is consistent with California law, where “[p]unitive damages are not designed to compensate a plaintiff for actual losses.” California State Auto. Ass’n Inter-Ins. Bureau v. Carter, 210 Cal. Rptr. 140, 143 (Ct. App. 1985).

251. See Burns v. City of Scottsdale, No. CIV-96-0578-PHX-RGS, 1998 U.S. Dist. LEXIS 13961, at *5 (D. Ariz. Apr. 26, 1998) (holding that a state survival statute precluding recovery for pain and suffering was not inconsistent with § 1983 because “the availability of punitive damages serves both as an appropriate punishment and a significant deterrent as contemplated by § 1983”).

the decedent's pain and suffering.\textsuperscript{233} In \textit{Brown v. Morgan County, Alabama},\textsuperscript{234} for example, the court indicated that in cases in which the victim is deceased, § 1983's compensatory purpose would be satisfied by a punitive damage award because the beneficiaries of the award would be the same as the beneficiaries of any traditional compensatory damage award—"the next of kin, or other beneficiaries of the deceased's estate."\textsuperscript{235} In other words, because any compensatory damages awarded under a state survival statute are intended to compensate for the decedent's losses,\textsuperscript{236} and thus may represent a potential windfall for the survivors,\textsuperscript{237} the survivors are "in no way disadvantaged" (\textit{i.e.}, they are not undercompensated)\textsuperscript{238} if the only damages available to them are punitive in nature.\textsuperscript{239}
While this analysis is somewhat overbroad, it appears to apply where the compensatory damages at issue are for the decedent’s pain and suffering, because that injury is strictly personal to the victim, and a failure to compensate for it would not deplete the victim’s estate. Indeed, that conclusion is implicit in the Garcia court’s observation that the exclusion of pain and suffering damages from a state survival statute represents a state legislature’s considered judgment that “once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering, or be made whole.”

In addition, the Garcia court noted that the California survival but not compensatory damages, [is] not inconsistent with the goal of compensation.”) (describing the holding in Brown).

261. For example, the analysis does not apply to damages intended to compensate for medical expenses incurred by the victim prior to death, because such economic losses obviously deplete the victim’s estate, see Kynaston v. United States, 717 F.2d 506, 511 (10th Cir. 1983) (“Any funds made available through a recovery [in a survival action]... compensate the estate for losses it has incurred.”), and an award of such damages would result in the decedent’s survivors receiving “a greater amount than they would if the estate had to pay the deceased’s medical expenses, etc.”, Brown, 518 F. Supp. at 664; cf. Weeks, 649 F. Supp. at 1309 (noting that “losses incurred by the decedent’s survivors” may include “expenses incurred in the treatment or burial of the decedent”). Thus, most state survival statutes “provide for recovery of... damages in the nature of hospital and medical expenses,” Gartin v. St. Joseph’s Hosp. & Med. Ctr., 749 P.2d 941, 945 (Ariz. Ct. App. 1988) (citing Barragan v. Superior Court, 470 P.2d 722, 724 (Ariz.Ct.App. 1988).

262. See, e.g., Holliday v. Pacific Atl. S.S. Co., 117 F. Supp. 729, 736 (D. Del. 1953) (“There is something incongruous... in close relatives seeking to... increase their own financial profit by... the pain and suffering sustained by the deceased unless, indeed, the damages might be considered in the nature of exemplary or punitive damages... .”).

263. See Kynaston, 717 F.2d at 510-11 n.10; Evans v. Twin Falls County, 796 F.2d 87, 94 (Idaho 1989); Sullivan, 52 Cal. Rptr. 2d at 664 n.3; Strickland v. Deaconess Hosp., 735 P.2d 74, 76 (Wash. Ct. App. 1987).

264. See Sullivan, 52 Cal. Rptr. 2d at 664 n.3; see also Kynaston, 717 F.2d at 511 (contrasting “the right of the injured person to receive damages to compensate his estate for its loss due to his injury” with “the right to receive damages to compensate himself for his pain and suffering”). See generally Barnes Coal Corp. v. Retail Coal Merchants Ass’n, 128 F.2d 645, 649 (4th Cir. 1942):

Underlying the distinction between actions that die with the person and those that survive is the basic thought that the reason for redressing purely personal wrongs ceases to exist... when the person injured cannot be benefited by a recovery... , whereas, since the property or estate of the injured person passes to his personal representatives, a cause of action for injury done to these can achieve its purpose as well after the death of the owner as before.


266. Garcia, 49 Cal. Rptr. 2d at 586; cf. Bills v. United States, 857 F.2d 1404, 1407 (10th Cir. 1988):

In the case of an action by which the injured party recovers in his lifetime, intangible items such as pain and suffering seem just and reasonable. But where the injured party dies before judgment or settlement, the legislature may reasonably conclude that it is unwarranted and incongruous to permit creditors of [the] decedent’s estate (or even next of kin) to derive a windfall by receiving pecuniary benefit based upon the pain and suffering experienced by someone else.
statute does not prevent a decedent's survivors from recovering for their own losses, including, arguably, damages for pain and suffering. It relied in particular upon the availability of a state law wrongful death action whereby the decedent's surviving relatives can recover "damages for being deprived of the decedent's society and comfort." The damages awarded to compensate for these losses are "akin to those awarded for pain and suffering and emotional distress." In the Garcia court's view, this prospect of what is effectively a pain and suffering award arising from the victim's death was sufficient to satisfy § 1983's compensatory purpose.

267. See Garcia, 49 Cal. Rptr. 2d at 586. See generally Bell v. Macy's Cal., 261 Cal. Rptr. 447, 454 (Ct. App. 1989) (referring to a "right of action in [a] relative" that is "independent of any belonging to the injured worker, and ordinarily could be pursued whether or not any action was prosecuted by the worker").

268. See Garcia, 49 Cal. Rptr. 2d. at 586 (noting that California law provides survivor's recovery can include "noneconomic damages for being deprived of the decedent's society and comfort"); see also Sullivan v. Delta Air Lines, Inc., 935 P.2d 781, 789 (Cal. 1997) (noting that the survival statute's prohibition of recovery for pain and suffering "applies only to causes of action personal to the decedent and not to causes of action that others may have"); In re Air Crash Disaster Near Honolulu, Haw., 783 F. Supp. 1261, 1264 (N.D. Cal. 1992) (observing that survival statutes do not address the losses of a decedent's "survivors," but "the pain and suffering . . . of the decedent up to the date of the decedent's death") (emphasis added); cf. Frye v. Town of Akron, 759 F. Supp. 1320, 1326 (N.D. Ind. 1991) (discussing the "difficult question" of whether a decedent's survivors "may claim damages for their own pain and suffering caused by the alleged deprivation of the decedent's . . . rights").


270. Garcia, 49 Cal. Rptr. 2d at 586; see also Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1355 (N.D. Cal. 1997): California law provides, in addition to recovery by the representative of the estate on the decedent's cause of action, a wrongful death action by decedent's heirs. Under these provisions, designated surviving relatives or the decedent's heirs at law can recover pecuniary losses caused by the death, including pecuniary support the decedent would have provided them, and noneconomic damages for being deprived of the decedent's society and comfort.

(Citations omitted.)

271. Canavin v. Pacific Southwest Airlines, Inc., 196 Cal. Rptr. 82, 91 (Ct. App. 1983). But cf. Krouse v. Graham, 562 P.2d 1022, 1028 (Cal. 1977) ("California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action.").

272. See Garcia, 49 Cal. Rptr. 2d at 586; see also LeBoff, supra note 149, at 237 n.139 (discussing Garcia). But cf. Weeks v. Benton, 649 F. Supp. 1297, 1308 n.10 (S.D. Ala. 1986) ("[E]ven if [state] tort law does provide adequate remedies for violations of federal rights, the victims are still entitled to pursue their remedies . . . under § 1983.").
3. Distinguishing County of Los Angeles and Garcia

In distinguishing Garcia, the County of Los Angeles court emphasized that it had been the potential availability of these state law wrongful death damages that had justified the holding in the earlier case. Where the defendant’s conduct does not result in the death of the plaintiff, by contrast, the County of Los Angeles court noted that the decedent’s heirs have no claim for wrongful death. It therefore held that application of the California survival statute would undermine § 1983’s compensatory purpose in the latter situation. However, this analysis is questionable. The survivors of an individual whose death was unrelated to an employer’s unlawful conduct may indeed have few, if any, direct remedies against the employer. Relatives of a discrimination victim generally cannot recover for their own injuries under Title VII or the ADA, for example, because they are not within the class of persons protected by those laws. The same presumably is true of most state employment discrimination statutes, and

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273. See County of Los Angeles, 58 Cal. Rptr. 2d at 360-61 (discussing Garcia); see also Reynolds v. County of San Diego, 838 F. Supp. 1064, 1069 (S.D. Cal. 1994) (“[S]tate wrongful death statutes have been borrowed to supplement § 1983 in the general area of wrongful death actions.”) (citing Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)), aff’d in part and remanded in part on other grounds, 84 F.3d 1162 (9th Cir. 1996). But cf. Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) (“[S]tate wrongful death tort remedies do not fulfill the deterrent purpose of section 1983.”).

274. See County of Los Angeles, 58 Cal. Rptr. 2d at 361; cf. Cairl v. Boeing Co., 113 Cal. Rptr. 925, 926 (Ct. App. 1974) (“Absent an allegation that the death occurred... as the result of defendant’s conduct, it is difficult to conclude that California’s, or any state’s, wrongful death statute applies...”) (citation omitted).

275. See County of Los Angeles, 58 Cal. Rptr. 2d at 361; see also LeBoff, supra note 149, at 241 (“Preventing recovery for a decedent’s pain and suffering has devastating effects... if a wrongful death action cannot be brought.”).

276. The California Supreme Court has recently held that application of the California survival statute is not incompatible with § 1983. See County of Los Angeles v. Superior Court, 981 P.2d 68, 79 (Cal. 1999).

277. In some cases, however, certain relatives (and therefore survivors) might be able to recover from the victim’s former employer under one or more state law theories. See, e.g., Snyder v. Michael’s Stores, Inc., 57 Cal. Rptr. 2d 105, 110 (Ct. App. 1996) (“When the spouse or child of an employee is directly injured by the employer’s negligence, and not as a further consequence of injury to the employee,.. California and most other jurisdictions permit the nonemployee... to sue under general principles of tort law.”). But cf. Anderson v. Northrop Corp., 250 Cal. Rptr. 189, 193 (Ct. App. 1988) (“If the tortfeasor employer did not direct conduct to the nonemployee spouse... no duty arises; and, hence, no cause of action exists...”).


279. See, e.g., Espinoza v. Fry’s Food Stores, 806 F. Supp. 855, 858 (D. Ariz. 1990) (holding that a discrimination victim’s spouse “lacks standing to assert a claim against [an employer] under
Nevertheless, conduct that violates Title VII or the ADA but does not cause death clearly can give rise to state law claims on behalf of the victim that survive in favor of the victim’s estate. In County of Los Angeles itself, for example, the decedent presumably could have asserted any of several state law claims that would have survived her death despite the California Court of Appeal’s finding of the inapplicability of the state wrongful death statutes in that case. In fact, the decedent’s sister may well have done so. Given that fact, the Garcia

the Arizona Civil Rights Act’); California v. HomeFed. Sav. & Loan Ass’n, 51 Fair Empl. Prac. Cas. (BNA) 990, 993 (N.D. Cal. 1989) (‘There is no authority for the proposition that the spouse of a party discriminated against by reason of a violation of the [California Fair Employment and Housing Act] . . . has a separate and independent claim for damages.’).

280. See, e.g., Rovira v. AT & T, 760 F. Supp. 376, 380 (S.D.N.Y. 1991) (‘Plaintiffs cite neither authority nor legislative history for the proposition that discriminatory conduct . . . aimed at an employee’s spouse, relative or ‘significant other,’ after employment has ended because of the employee’s death or another occurrence, constitutes discrimination in employment under the statute.’); HomeFed. Sav. & Loan Ass’n, 51 Fair Empl. Prac. Cas. (BNA) at 992-93 (precluding alleged discrimination victim’s widow from recovering “on her own behalf” under state employment discrimination statute).

281. Indeed, one court has observed that there are “few violations of [civil] rights that will not have some type of concomitant remedy in the state law.” Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983). For the author’s previous consideration of the simultaneous assertion of state and federal employment discrimination claims, see Michael D. Moberly, Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation, 18 WHITTIER L. REV. 499 (1997).

282. The conduct alleged in County of Los Angeles would have been actionable under the California Fair Employment and Housing Act (‘CFEHA’), CAL. GOV’T CODE §§ 12900-12966 (West 1992 & Supp. 1995), for example, and a claim under that act could have been asserted simultaneously with the plaintiff’s § 1983 claim, see, e.g., Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1112-13 (9th Cir. 1991). The plaintiff also could have asserted a common law wrongful discharge claim premised upon the public policy exception to the employment-at-will doctrine. See Rojo v. Kliger, 801 P.2d 373, 388 (Cal. 1990). But cf. Cook v. Lindsay Olive Growers, 911 F.2d 233, 238 (9th Cir. 1990) (concluding that “the California legislature intended the [CFEHA] to be the exclusive remedy for a discriminatory wrongful discharge”).

283. See Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1355 (N.D. Cal. 1997) (‘California law permits a decedent’s heirs or successors to recover damages resulting from the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived.’).

284. See County of Los Angeles, 58 Cal. Rptr. 2d at 361. However, the decedent’s claim for emotional distress under the CFEHA presumably would not have survived her death. See California v. Home Fed. Sav. & Loan Ass’n, 51 Fair. Empl. Prac. Cas. (BNA) 990, 992 (N.D. Cal. 1989) (‘Although emotional distress damages may be recovered under the CFEHA, they do not survive the death of the injured party.’).

285. The court noted that the decedent originally sought relief “on a variety of theories, including violations of the federal Civil Rights Acts’, County of Los Angeles, 58 Cal. Rptr. 2d at 359, but that the only question raised by the petition for review, and thus the only one it was deciding, was whether the state survival statute’s prohibition of recovery for a decedent’s pain and suffering “applies to claims brought by the decedent’s representative under section 1983’, Id. at 360...
court’s conclusion that the availability of alternative state law remedies may be sufficient to satisfy § 1983’s compensatory purpose,\(^{26}\) which the County of Los Angeles court acknowledged makes “perfect sense” in cases where the employer’s conduct caused the victim’s death,\(^{27}\) may be equally applicable where the victim’s death is unrelated to the employer’s conduct.\(^{28}\)

Significantly, the California Supreme Court recently reversed the California Court of Appeal’s ruling in County of Los Angeles,\(^{29}\) albeit on slightly different grounds.\(^{30}\) Noting that its analysis was consistent with that of the Colorado district court in Rosenblum v. Colorado Department of Health,\(^{31}\) the California Supreme Court held that the California survival statute’s prohibition of recovery for a decedent’s pain and suffering is not inconsistent with the compensatory or deterrent objectives of the federal civil rights laws.\(^{32}\) Among other things, the court

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\(^{26}\) n.3 (ellipses omitted). The California Supreme Court likewise noted that the decedent had asserted “violations of state law as well as a federal [claim].” County of Los Angeles v. Superior Court, 981 P.2d 68, 69 (Cal. 1999).

\(^{27}\) See Garcia, 49 Cal. Rptr. 2d at 586.

\(^{28}\) See County of Los Angeles, 58 Cal. Rptr. 2d at 361. Garcia was also cited with apparent approval in Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 573 n.2 (Ct. App. 1998).

\(^{29}\) In Carter v. City of Birmingham, 444 So. 2d 373, 380 (Ala. 1983), for example, the Alabama Supreme Court engaged in essentially the same analysis as the Garcia court, holding that a state statute precluding the recovery of compensatory damages in wrongful death cases is not inconsistent with § 1983 because an alternative state law remedy is available in such cases. See also Blair v. City of Rainbow City, 542 So. 2d 275, 277 (Ala. 1989) (quoting Carter and characterizing its analysis as consistent with Robertson v. Wegmann, 436 U.S. 584 (1978)). Although Justice Richard Jones dissented in Carter, he noted that the court’s reasoning applies in all § 1983 survival cases, and not merely those in which the defendant’s conduct results in the victim’s death. Carter, 444 So. 2d at 380 (Jones, J., dissenting). Addressing the issue the County of Los Angeles court appears to have overlooked, Justice Jones explained: “Just as our wrongful death act affords a state remedy where death results from conduct proscribed by § 1983, our statutory and common law affords certain remedies for personal injury resulting from the same culpable conduct [that does not result in death].” Id.

\(^{30}\) See County of Los Angeles v. Superior Court, 981 P.2d 68 (Cal. 1999).

\(^{31}\) In fact, the California Supreme Court declined to express a view as to whether the state survival statute’s preclusion of damages for the decedent’s pain and suffering would apply in cases such as Garcia in which the alleged civil rights violation caused the victim’s death. See id. at 78 n.6.

\(^{32}\) 878 F. Supp. 1404 (D. Colo. 1994); see supra notes 168-87 and accompanying text.

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To conclude that [the statute’s] limitation on damages could have any influence on the behavior of public officials and employees, we would have to accept, to paraphrase the high court, the “farfetched” proposition that they would have both the desire and ability to select as sexual harassment victims only those who will die before resolution of a civil rights lawsuit and whose only compensable injury will be emotional distress. Id. at 76 (quoting Robertson v. Wegmann, 436 U.S. 584, 592 n.10 (1978)).
concluded that the statute permits the decedent’s estate to recover all damages to which the decedent would have been entitled except those for pain and suffering,293 and that the California legislature had reasonably concluded that pain and suffering injuries are strictly personal to the decedent, and thus are not transmissible to the estate.294

The California Supreme Court also indicated that its analysis was not altered by the fact that the statute’s application may preclude any recovery in some sexual harassment cases because harassment victims may not suffer any lost wages or other recoverable pecuniary losses295 — that is, because compensation for pain and suffering may be the only significant component of compensation in a sexual harassment case.296 Quoting the Supreme Court’s observation in Robertson v. Wegmann297 that a state survival statute “cannot be considered ‘inconsistent’ with federal law merely because it causes the plaintiff to lose the litigation,”298 the County of Los Angeles court concluded that the California statute does not conflict with the federal civil rights laws even if its application would eliminate all recovery in some sexual harassment cases.299

293. See id. at 75-77. “[U]nder California’s survival law, an estate can recover not only the deceased plaintiff’s lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages.” Id. at 75.

294. See id. at 76-78. The Court explained:

   Essentially, the line drawn by the Legislature approximates the pecuniary out-of-pocket losses the deceased plaintiff experienced because of the defendant’s unlawful behavior. These pecuniary losses, such as lost or reduced wages or expenses of medical care, actually reduced the plaintiff’s income or increased the plaintiff’s pecuniary expenses. If uncompensated, these pecuniary losses would reduce the value of the estate below what it would have been in the absence of the defendant’s harmful conduct by reducing the plaintiff’s lifetime income or by increasing the plaintiff’s lifetime expenses. By contrast, when the plaintiff experiences emotional distress, the loss is non-pecuniary. Psychic injury, while it can be psychologically devastating, does not itself reduce income or increase expenses. Therefore, psychic injury does not reduce the value of the plaintiff’s estate compared to what it would have been in the absence of the injury, and the Legislature’s decision not to allow the estate to recover damages for such injury was reasonable.

   Id. at 76 (footnote omitted).

295. This was not the case in County of Los Angeles, however, because “in addition to damages for emotional distress, the estate [was] seek[ing] compensation for the deceased plaintiff’s back wages as a result of alleged wrongful termination, a remedy available under California’s survival law.” Id. at 77.

296. See id. at 76-77. The court observed that “the very essence of the harm suffered by any victim of sexual harassment is an affront to personal dignity.” Id. at 77.


298. County of Los Angeles, 981 P.2d at 77 (quoting Robertson, 584 U.S. at 593).

299. See id. at 77 & n.4. The court did note, however, that the United States Supreme Court has not specifically addressed “whether a state survival law precluding a deceased plaintiff’s estate
C. The Impact of the Victim’s Cause of Death

Despite the California Court of Appeal’s questionable analysis in *County of Los Angeles v. Superior Court*,300 that court may have been correct in concluding that the survival of employment discrimination claims for pain and suffering depends upon whether the employer’s conduct causes the victim’s death.301 However, the impact of this issue appears to be precisely the opposite of what the California Court of Appeal perceived it to be.302 In particular, a state survival provision precluding the recovery of damages for the decedent’s pain and suffering may be inconsistent with federal deterrent objectives in discrimination cases in which the employer’s conduct causes or contributes to the victim’s death.303 That conclusion stems primarily from the Supreme Court’s analysis in *Carlson v. Green*,304 a case decided two years after its landmark decision in *Robertson v. Wegmann*.305

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300. 58 Cal. Rptr. 2d 358 (Ct. App. 1996), rev’d, 981 P.2d 68 (Cal. 1999).
301. In *Garcia v. Superior Court*, 49 Cal. Rptr. 2d 580 (Ct. App. 1996), for example, the California Court of Appeal noted that the *Robertson* Court permitted a civil rights claim to abate under the terms of a state survival statute where the victim’s death was “unrelated to the civil rights violation,” but that the Court’s reasoning suggests that the outcome in that case might have been different “if the civil rights violation [had] caused the death.” Id. at 583-84. *But cf. Ascani v. Hughes*, 470 So. 2d 207, 210 (La. Ct. App.) (“Following the rationale of *Robertson*, there is no reason to reach a different result where the [defendant’s conduct] results in death . . . .”), review denied, 472 So. 2d 919 (La. 1985).
302. Compare *County of Los Angeles*, 58 Cal. Rptr. 2d at 360 (concluding that a survival statute precluding recovery for pain and suffering is inconsistent with federal law when the employer’s conduct is “unrelated” to the victim’s death) with *Doore*, supra note 19, at 394 (“Clearly, the situation in which the discrimination is related to the cause of death presents a special case where abatement of the claims is inconsistent with the policies underlying the ADA or other civil rights statutes.”). See generally *Bills v. United States*, 857 F.2d 1404, 1407 (10th Cir. 1988) (concluding that an award to survivors for the decedent’s pain and suffering may be “particularly” unwarranted “in cases where the death was caused by extraneous factors unrelated to the tortfeasor’s wrongdoing”).
304. 446 U.S. 14 (1980).
305. 436 U.S. 584 (1978). See generally *Jones*, 533 F. Supp. at 1303 (“*Carlson* and *Robertson* seem to lend special significance to scenarios where [unlawful conduct is] followed by resultant death.”).
1. Carlson v. Green

Carlson involved a claim asserted against federal officials directly under the United States Constitution pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, an earlier Supreme Court decision recognizing a cause of action in which "federal agents, as individuals, are liable for damages resulting from their actions when acting under color of federal law." Like § 1983, Title VII, and the ADA, Bivens is silent with respect to whether claims asserted thereunder survive the death of the injured party.

Carlson arose out of the death of the plaintiff's son while incarcerated in a federal prison. The plaintiff contended that the failure of prison officials to provide adequate medical attention caused her son's death, thereby violating his Eighth Amendment rights. Under the

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307. Shannon v. General Elec. Co., 812 F. Supp. 308, 323 (N.D.N.Y. 1993) (characterizing Bivens). Imposing such a cause of action directly from the Constitution was deemed necessary because a claim under § 1983 (the civil rights statute at issue in Robertson) "requires action under color of state law", Martinez v. Winner, 771 F.2d 424, 441 (10th Cir. 1985), and thus "does not apply to those who act under color of federal law", Bush v. Bays, 463 F. Supp. 59, 63 (E.D. Va. 1978). As the Supreme Court itself has noted:


311. See Beard v. Robinson, 563 F.2d 331, 333 (7th Cir. 1977) ("Neither the Civil Rights Acts nor the Supreme Court's decision in Bivens speaks to the abatement or survival of actions brought thereunder."); Green v. Carlson, 581 F.2d 669, 673 (7th Cir. 1978) (noting the "absence of any applicable federal survivorship rule" in Bivens actions), aff'd, 446 U.S. 14 (1980).

312. See Carlson, 446 U.S. at 16 & n.1.

313. In particular, the prison officials were alleged to have provided improper medical care for the decedent's chronic asthmatic condition. See id. at 16 n.1.

314. See id. at 16. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
applicable state law, however, "a personal injury claim does not survive where the acts complained of caused the victim's death."\textsuperscript{315}

The Court rejected the argument that it should look to this state law in assessing the survival of the decedent's \textit{Bivens} claim,\textsuperscript{316} holding that only a uniform federal survivorship rule would suffice to redress the federal constitutional deprivation being alleged.\textsuperscript{317} It stated that whenever a state survival statute would result in the abatement of a \textit{Bivens} claim being asserted against defendants whose conduct caused the victim's death, federal common law applies to permit survival of the action.\textsuperscript{318}

The Court maintained that this result was not inconsistent with its previous holding in \textit{Robertson},\textsuperscript{319} because in \textit{Robertson} the victim's death was not caused by the alleged constitutional deprivation upon which the action was based.\textsuperscript{320} Significantly, Justices Powell and Stewart suggested in a concurring opinion in \textit{Carlson} that they would have reached the same result if that case had arisen under § 1983,\textsuperscript{321} and the

\textsuperscript{315} \textit{Carlson}, 446 U.S. at 17 n.4 (citing IND. CODE § 34-1-1-1 (1976)). On the other hand, a state law wrongful death claim apparently could have been asserted by the decedent's personal representative, and there was some dispute in \textit{Carlson} with respect to whether the claim at issue arose solely under the state survival statute, or whether it had also been asserted under the wrongful death statute. \textit{See id.} at 18 n.4. As another court has observed, however, the wrongful death claim "would have been a separate and distinct action and would not have derived or 'survived' from plaintiff's original personal injury claim." \textit{Kynaston} v. United States, 717 F.2d 506, 510 n.8 (10th Cir. 1983). In any event, given its disposition of the case, the \textit{Carlson} Court did not address the significance of the potential state law wrongful discharge claim. \textit{See Carlson}, 446 U.S. at 18 n.4.

\textsuperscript{316} The Court explained:

\textit{Bivens} defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work.

\textit{Carlson}, 446 U.S. at 24-25 n.11 (Harlen, J., concurring in judgment) (citing \textit{Bivens}, 403 U.S. at 409).

\textsuperscript{317} \textit{See id.} at 23.

\textsuperscript{318} \textit{See id.} at 24 (adopting the reasoning of the lower court decision under review).

\textsuperscript{319} \textit{See Bell} v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984) (stating that the \textit{Carlson} Court "distinguished \textit{Robertson}"); \textit{O'Connor} v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (same).

\textsuperscript{320} \textit{See Carlson}, 446 U.S. at 24.

\textsuperscript{321} \textit{See Bell}, 746 F.2d at 1238 (discussing \textit{Carlson} concurrence); \textit{Davis} v. City of Ellensburg, 651 F. Supp. 1248, 1255 (E.D. Wash. 1987) (same); \textit{Heath} v. City of Halethorpe, 560 F. Supp.
analysis in *Carlson* may also apply by analogy in other civil rights cases,\(^{222}\) including those arising under Title VII and the ADA.\(^{223}\)

2. Applying *Carlson v. Green* in Employment Discrimination Cases

One court has indicated that in light of *Robertson* and *Carlson*, state law now governs the survival of most federal civil rights actions,\(^ {224}\) but that a federal “rule” permitting survival\(^ {225}\) necessarily supersedes any state law that would require the abatement of an action in which the defendant’s conduct caused the victim’s death.\(^ {226}\) Although cases in

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322. In *Kittler v. City of Chicago*, No. 84 C 1649, 1984 U.S. Dist. LEXIS 24714 (N.D. Ill. July 30, 1984), for example, the court denied the defendants’ motion to dismiss the plaintiff’s claims under 42 U.S.C. §§ 1981, 1983 and 1985, which had been premised upon the contention that (1) the Illinois survival act did not permit recovery for the death of the victim, and (2) “a party wishing to bring a death action pursuant to §§ 1981, 1983 or 1985 must do so by virtue of § 1988, which embraces state law, where applicable, providing for . . . survival actions.” *Id.* at *2 (internal punctuation omitted). The court noted that “since *Carlson v. Green*, 446 U.S. 14 (1980), *Bivens*-type actions against federal officers survive even where state law does not permit survival when the death was caused, unlike that in *Robertson*, by the injury complained of.” *Id.* at *2-3. Noting that the holding in *Carlson* had also been applied by “extension” to permit the survival of § 1983 actions in which the defendant’s conduct caused the victim’s death, the *Kittler* court held that all of the plaintiff’s federal civil rights claims survived the decedent’s death. *See id.* at *3. *See generally* Green v. Carlson, 581 F.2d 669, 673 (7th Cir. 1978) (observing that “actions brought under the Civil Rights Acts and those of the *Bivens*-type are conceptually identical and further the same policies,” and that the analysis of the two types of actions is therefore similar), *aff’d*, 446 U.S. 14 (1980).


324. *See* O’Connor *v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1348 (E.D. Va. 1981). Indeed, this may even be true in *Bivens* actions, where several courts have held that, notwithstanding the Supreme Court’s decision in *Carlson*, “questions of survivability . . . are decided by looking to state law.” Grandbouche v. Clancy, 825 F.2d 1463, 1465 (10th Cir. 1987) (citing cases); *see also* Estate of Maselli by Maselli v. Silverman, 606 F. Supp. 341, 343 (S.D.N.Y. 1985) (“Federal courts have construed section 1988 to incorporate into section 1983 state statutes governing survival actions, and have applied the same state statutes in *Bivens* claims.”) (citations omitted).

325. *See* Jacob v. Bloechle, 739 F.2d 239, 244 (6th Cir. 1984) (observing that “a federal court can, notwithstanding abatement under the stricture of state law, declare the necessity for [the] survival of a civil rights claim thus, effectively, creating a ‘federal common law’ survival of actions rule”) (citing Robertson v. Wegmann, 436 U.S. 584, 590-92); Jones v. George, 533 F. Supp. 1293, 1302 (S.D. W. Va. 1982) (“In *Carlson . . .*, the Supreme Court opted for a federal common law rule of survival . . .”).

326. *See* O’Connor, 523 F. Supp. at 1348; *cf.* McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (citing *Robertson* and *Green* in concluding that “limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the de-
which unlawful employment discrimination results in an individual’s death are undoubtedly rare,\textsuperscript{327} such a situation is certainly conceivable.\textsuperscript{328}

In Caraballo v. South Stevedoring,\textsuperscript{329} for example, an employee suffering from pulmonary fibrosis\textsuperscript{330} brought suit under the ADA after his employer allegedly refused his requests for reasonable accommodation, and instead “continued to require him to work around hazardous materials and airborne particles, in contravention of his doctor’s orders.”\textsuperscript{331} The employee subsequently died while the action was pending.\textsuperscript{332} Although the court’s opinion does not indicate whether the employer’s conduct was alleged to have contributed to the employee’s death, that may have been the case.\textsuperscript{333} Other employment discrimination cases involve allegations of employer conduct that conceivably could cause or contribute to an employee’s death as well.\textsuperscript{334}

Because they involved state survival statutes that would result in the complete abatement of an action,\textsuperscript{335} neither Robertson nor Carlson\textsuperscript{336}...
resolves the applicability, in federal employment discrimination cases, of state survival provisions that merely preclude the recovery of damages for pain and suffering. However, that issue was discussed in County of Los Angeles v. Superior Court.

The court in the latter case affirmed its previously expressed view that where the employer’s conduct causes the victim’s death, a survival statute’s preclusion of recovery for pain and suffering is not inconsistent with federal law “insofar as compensation to the victim is concerned.” The court nevertheless cautioned that the application of such a statute would eliminate the only meaningful deterrent available in cases where “the primary component of damages...is recovery for emotional distress.” Significantly, this is an apt characterization of many sexual harassment cases, although that situation has been altered to

336. Carlson did involve state law damage limitations. See Jones, 533 F. Supp. at 1304 (“[l]f the decedent, as was true of the one in Carlson, is not survived by a spouse or dependent child or relative, damages are limited to funeral, burial and other expenses incurred directly in connection with the death, such as the costs of administration of the decedent’s estate and medical costs relative to the injury resulting in death.”). However, “application of the state law damage limitations would have precluded the action entirely,” because the plaintiff “could not, as a matter of law, satisfy the...jurisdictional amount” if they applied. Sager v. City of Woodland Park, 543 F. Supp. 282, 295, 296 n.16 (D. Colo. 1982) (discussing Carlson).

337. See, e.g., Jefferson v. City of Tarrant, 118 S. Ct. 481, 488 n.2 (1997) (Stevens, J., dissenting) (asserting that the holding in Robertson “does not bear on the question whether a state limitation on the measure of damages applies to a § 1983 claim”); McFadden, 710 F.2d at 911 (observing that Robertson “does not require deference to a survival statute that would...limit the remedies available under section 1983”).


339. Id. at 362 n.7. Because the employer’s conduct in County of Los Angeles was unrelated to the victim’s death, see id. at 360, this aspect of the court’s opinion was dicta.

340. See id. at 362 n.7.

341. Id. at 361; cf. LeBoff, supra note 149, at 236 (“In actions where the predominant injuries are emotional, excluding pain and suffering damages has the practical effect of abating the entire claim.”). See generally Alexander v. Whitman, 114 F.3d 1392, 1399 (3d Cir. 1997) (“The major item of damages in a survival action (aside from funeral and burial expenses) is recovery for the decedent’s pain and suffering between the time of injury and the time of death.”).}

342. See, e.g., Peralta Community College Dist. v. Fair Employment & Hous. Comm’n, 801 P.2d 357, 365 (Cal. 1990) (“In harassment cases, ... where no detriment to the employment has been shown and the employee’s out-of-pocket losses are minimal, the only injury is emotional distress and the only redress is compensatory damages.”); Ross v. Double Diamond, Inc., 672 F. Supp. 261, 278 n.9 (N.D. Tex. 1987) (observing that in the typical “hostile work environment” sexual harassment case, the plaintiff “cannot receive back pay or reinstatement which generally is the primary relief sought” under Title VII); LeBoff, supra note 149, at 243 (“Since damages for sexual harassment are primarily for pain and suffering, which many state survival statutes exclude, the perpetrator...has no legal incentive to refrain from continued violations.”); cf. In re Town of Hemstead v. State Div. of Human Rights, 649 N.Y.S.2d 942, 943 (App. Div. 1996) (Krausman, J., dissenting) (observing that “mental pain and suffering...is often the only consequence of discriminatory conduct”).
some extent by the Civil Rights Act of 1991’s expansion of Title VII remedies to include punitive damages.343

3. Revisiting the Colorado Approach: Sager v. City of Woodland Park

a. Sager’s Consideration of § 1983’s Deterrent Objective

The impact of a survival statute’s preclusion of recovery for pain and suffering in cases where the defendant’s conduct causes death was also addressed in Sager v. City of Woodland Park.344 The Sager court relied on Carlson345 and Robertson346 in refusing to apply the same Colorado statute347 that was also at issue in Rosenblum v. Colorado Department of Health348 because the defendant’s conduct in Sager had caused the victim’s death.349

Sager involved a § 1983 claim asserted by the parents and sister350 of an individual who had been killed in a police shooting.351 In the course of addressing the plaintiffs’ motion to strike certain affirmative defenses,352 the court on its own initiative raised the issue of whether the damage limitations contained in the statute353 applied to the plaintiffs’ §

345. See id. at 295-96.
346. See id. at 294-97.
348. 878 F. Supp. 1404 (D. Colo. 1994). The California Court of Appeal implicitly rejected the analysis in Rosenblum, where the court held that the Colorado survival statute is not inconsistent with federal civil rights law (see supra notes 168-87 and accompanying text), in County of Los Angeles. See County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 361 (Cal. App. 1996), rev’d, 981 P.2d 68 (Cal. 1999).
350. See id. at 290-91. The court ultimately concluded that the sister lacked standing to sue because she was not acting as the decedent’s personal representative, as provided for in the Colorado survival statute. Id. See generally Espinoza v. O’Dell, 633 P.2d 455, 466 (Colo. 1981) ("The personal representative of the decedent’s estate, by necessity, stands in the decedent’s shoes in a state survival action.")., cert. dismissed, 456 U.S. 430 (1982).
352. See id. at 286, 292.
353. See supra note 176 and accompanying text; see also Salazar v. Dowd, 256 F. Supp. 220, 223 (D. Colo. 1966) (observing that the Colorado survival statute "specifically limits the damages recoverable in a survival action).
While acknowledging that the issue has not been definitively resolved, the court concluded that the state statutory damage limitations were inapplicable to the plaintiffs' federal claim. It emphasized that § 1983 damage awards are intended to compensate for and deter violations of federal constitutional (and statutory) rights, as opposed to state law rights. Relying on Justice White's opinion in Jones v. Hildebrant and its own prior decision in Sanchez v. Marquez, the Sager court held that resort to federal damage rules was necessary to fulfill those purposes, given "both the serious nature of a constitutional injury and the corresponding importance of preventing its recurrence."

In explaining this result, the court noted that a "full panoply" of damages, including specifically damages for mental and emotional distress, are ordinarily available in § 1983 actions, while the Colorado

354. See Sager, 543 F. Supp. at 292-93 & n.11.
355. See id. at 293. At the time Sager arose, the Colorado Supreme Court had recently found it "unnecessary to determine whether any inconsistency exists between the state survival statute's damage limitations and the remedies required under § 1983." Espinoza, 633 P.2d at 466.
357. See id.
358. 432 U.S. 183, 189 (1977) (White, J., dissenting); see supra notes 120-28 and accompanying text. In particular, the Sager court quoted the following passage from Justice White's opinion in Jones:

It is clear that by enacting § 1983, Congress intended to create a federal right of action separate and independent from any remedies afforded under state law. State law may be relevant where a trial court is seeking to fix a remedy under § 1983, but it is by no means clear that state law may serve as a limitation on recovery where the remedy provided under state law is inadequate to implement the purposes under § 1983. Thus both federal and state rules may be utilized, whichever better serves the policies expressed in the federal statutes.

Sager, 543 F. Supp. at 293 (White, J., dissenting) (quoting Jones, 432 U.S. at 190) (internal quotation marks and citation omitted).
359. 457 F. Supp. 359 (D. Colo. 1978). In Sanchez, the court stated:

Since the survival statute does not limit the damages recoverable in this case, I need not reach the question of whether . . . damages in a Section 1983 case could ever be limited or proscribed by state law. I am much persuaded by Mr. Justice White's dissent in Jones v. Hildebrant . . . and, if required, I believe I would rule that state law may not serve as a limitation on recovery in a Section 1983 case. It is abundantly clear to me that Section 1983 provides a federal right of action totally independent of any state remedies. Such purported limitations would constitute an impermissible interference with expressed federal policies.

Id. at 362 n.1.
361. See id. at 294. One court has asserted that "the primary component of damages in [§ 1983] actions is recovery for emotional distress." County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 361 (Ct. App. 1996), rev'd, 981 P.2d 68 (Cal. 1999).
survival statute precludes any recovery for pain and suffering.\textsuperscript{362} The court maintained that the Supreme Court had essentially recognized the anti-deterrent implications of applying such limitations in § 1983 cases in which unlawful conduct causes the victim’s death in \textit{Robertson},\textsuperscript{363} and that this view had been confirmed in \textit{Carlson}.\textsuperscript{364}

The essence of the issue, in the \textit{Sager} court’s view, is reflected in the following reasoning from the lower court decision that was affirmed in \textit{Carlson}:

It would be anomalous as well as ironic to hold that [a plaintiff can seek] redress . . . [if] he survive[s] the alleged wrongdoing, but [where] the wrongdoing cause[s] his death, the law is impotent to provide a remedy to benefit his estate. . . . Allowing recovery for injury but denying relief for the ultimate injury—death—would mean that it would be more advantageous for a tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law.\textsuperscript{365}

However, there are problems with this analysis.\textsuperscript{366} First, it ignores the California Court of Appeal’s conclusion in \textit{Garcia v. Superior Court}\textsuperscript{367} that wrongdoers are not likely to assess whether they could limit their potential liability by killing their victims.\textsuperscript{368} The \textit{Garcia} court’s

\textsuperscript{362} See \textit{Sager}, 543 F. Supp. at 289 n.6.

\textsuperscript{363} See \textit{id} at 295. This is an overstatement. The \textit{Robertson} Court did indicate that its analysis might not apply “in cases where the alleged misconduct caused the plaintiff’s death.” \textit{Weeks v. Benton}, 649 F. Supp. 1297, 1306 n.8 (S.D. Ala. 1986); cf. \textit{McFadden v. Sanchez}, 710 F.2d 907, 911 (2d Cir. 1983) (stating that the \textit{Robertson} Court “pointedly distinguished a . . . claim for a deprivation of federally protected rights that caused the decedent’s death.”). However, the Court did not purport to decide that issue, but instead merely indicated that application of a state survival statute “might be inconsistent with federal law if the civil rights violation caused the [victim’s] death.” \textit{Garcia v. Superior Court}, 49 Cal. Rptr. 2d 580, 583-84 (Ct. App. 1996) (emphasis altered).

\textsuperscript{364} \textit{Sager}, 543 F. Supp. at 295-96.

\textsuperscript{365} See \textit{id} at 296 (quoting \textit{Green v. Carlson}, 581 F.2d 669, 674 (7th Cir. 1978), aff’d, 446 U.S. 14 (1980)); cf. \textit{Guyton v. Phillips}, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981) (“To deny recovery for pain and suffering would strike at the very heart of a § 1983 action. . . . The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim.”), \textit{disapproved on other grounds} in \textit{Peraza v. Delameter}, 722 F.2d 1455, 1457 (9th Cir. 1984).


\textsuperscript{367} 49 Cal. Rptr. 2d 580 (Ct. App. 1996).

\textsuperscript{368} See \textit{id} at 586; see \textit{supra} note 249 and accompanying text.
reasoning on this point seems persuasive. Chief Justice Rehnquist, for example, has criticized the suggestion that wrongdoers, relying on the nuances of a state survival statute, would intentionally kill their victims, rather than violate their rights to a lesser extent, in order to minimize their potential liability. Another state court has likewise characterized that assumption as too simplistic for the realities of most situations, and "of some use only if the actor is consciously bent upon killing the victim." And in actuality it may be in this latter circumstance (which, in any event, is difficult to envision in the employment setting) that a survival statute is least likely to influence the actor's conduct.

The Sager court's analysis also ignores the potential availability of punitive damages as an alternative means of deterring civil rights violations—another factor that influenced the Garcia court. The court in County of Los Angeles v. Superior Court did consider this alternative, but rejected it on the ground that, in reality, the prospect of a punitive damage award was unlikely.

This assessment may have merit in the typical § 1983 case, where the "target" defendant is a municipality, and any individual defendants

369. See generally Furman v. Georgia, 408 U.S. 238, 301 (1972) (Brennan, J., concurring) (characterizing as "implausible" the assertion that an individual contemplating the possible commission of a capital crime will "not only consider the risk of punishment, but also distinguish between two possible punishments").


371. See Culver-Union Township Ambulance Serv. v. Steindler, 611 N.E.2d 698, 705 (Ind. Ct. App. 1993) (citing Carlson, 446 U.S. at 50 n.17 (Rehnquist, J., dissenting)); cf. Badia v. City of Casa Grande, No. 2 CA-CV 98-0122, 1999 Ariz. LEXIS 40, at *22 (Ct. App. March 17, 1999) ("[I]t is patently absurd to suggest that [individuals] are likely to engage in [unlawful] conduct based on the assumption that the victim will die within a short period of time, thereby freeing them from liability for pain and suffering damages.").

372. Culver-Union, 611 N.E.2d at 705; cf. O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (discussing the prospect of "a state official contemplating such severe conduct" that it would "result[] in the death of the injured party").

373. But see McNutt v. Duke Precision Dental & Orthodontic Labs., Inc., 698 F.2d 676, 677, 679 (4th Cir. 1983) (discussing "a claim for racially discriminatory discharge following discriminatory harassment in employment" that had "culminated[] in an incident ..., during which [a] fellow employee allegedly, armed with a handgun, threatened to blow the plaintiff's head off," and the fellow employee "was later convicted of assault with intent to kill").

374. See Furman, 408 U.S. at 301 (Brennan, J., concurring) (observing that "many, and probably most, capital crimes cannot be deterred by the threat of punishment").

375. See Garcia, 49 Cal. Rptr. 2d at 585-86; cf. Bowling v. Oldham, 753 F. Supp. 588, 590 (M.D.N.C. 1990) ("The policy of preventing abuses of power by state officials is satisfied by the availability of punitive damages.").


377. See id. at 362 n.7 (characterizing the potential for a significant punitive damage award as "more imagined than real").
would be public officials,\textsuperscript{379} because punitive damages are unavailable against municipalities\textsuperscript{380} and "may be limited as against any individual defendants by . . . the personal wealth of the individuals."\textsuperscript{381} The analysis is less convincing in Title VII and ADA cases,\textsuperscript{382} however, where the principal defendant, typically a private employer,\textsuperscript{383} is now subject to a potential punitive damage award.\textsuperscript{384}

In addition, punitive damage awards are often based upon the wealth of a defendant\textsuperscript{385} precisely because they are intended to deter future wrongdoing,\textsuperscript{386} rather than compensate for the victim's injuries.\textsuperscript{387}
This suggests that in the case of individual defendants, in particular, a relatively modest punitive damage award may well be sufficient to deter future civil rights violations. On this latter point, at least, the County of Los Angeles court’s reasoning is questionable.

In addition, there are other potential deterrents to unlawful conduct, such as the prospect of criminal liability, that may offset the unavailability of pain and suffering damages under a state survival statute. In McNutt v. Duke Precision Dental & Orthodontics Laboratories, for example, one of the individual defendants was convicted of assault as the result of a harassment incident that formed part of the basis for the plaintiff’s employment discrimination claim. The possibility of such punishment may be a far more effective deterrent than any prospect of a civil damage award. And even in cases where that is not true, the

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388. See City of Newport, 453 U.S. at 266 (observing that “[punitive damages by definition are not intended to compensate the injured party”); Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992) (stating that “neither compensation nor enrichment is a valid purpose of punitive damages”).

389. See, e.g., Shaw v. Cassar, 558 F. Supp. 303, 316 (E.D. Mich. 1983) (finding that a “relatively modest award of punitive damages [was] adequate . . . to deter [individual] defendants from any further violations of the civil rights law[s]”).


391. See Rosario Nevarez v. Torres Gaztambide, 633 F. Supp. 287, 298 n.15 (D.P.R. 1986) (“Should punitive damages prove to be insufficient to . . . deter . . . pernicious practices, perhaps the next step should be the initiation of criminal charges . . . .”), rev’d on other grounds, 820 F.2d 525 (1st Cir. 1987); Morse, supra note 108, at 29 (noting that an individual violating § 1983 may be subject to “state and federal criminal liability”).

392. 698 F.2d 676 (4th Cir. 1983).

393. See id. at 677, 679. The potential discharge of such an individual also serves as a deterrent. See Johnson v. Northern Ind. Pub. Serv., 844 F. Supp. 466, 469 (N.D. Ind. 1994) (“It may be presumed that employers do not wish to employ supervisors who discriminate and subject their employers to liability. Thus . . . potential termination from liable employers exists as an effective deterrent.”); Morse, supra note 108, at 36 (“[I]t is implausible to suggest that a municipal employer will risk . . . loss of a job because damages are not recoverable against his employer [under § 1983].”).

394. See, e.g., Rosario Nevarez, 633 F. Supp. at 298 n.15; see also Carlson v. Green, 446 U.S. 14, 51 n.17 (1980) (Rehnquist, J., dissenting) (questioning whether “a [civil] remedy will have a deterrent impact . . . beyond that of ordinary criminal sanctions”).

395. See, e.g., Collins v. Frisbie, 189 F.2d 464, 468 (6th Cir. 1951) (“Obviously fear of criminal punishment has been an insufficient deterrent . . . in this case, if the averments of the petition
existence of other state or federal damage claims that do survive the victim’s death may be a sufficient deterrent to overcome the unavailability of pain and suffering damages.

b. Sager’s Consideration of § 1983’s Compensatory Objective

Another questionable aspect of the Sager court’s analysis is its suggestion that the damages necessary to fulfill § 1983’s compensatory purpose may exceed those necessary to satisfy comparable state law objectives. The purpose of any compensatory damage award, including an award for pain and suffering, is to compensate for the victim’s actual losses. At least in employment discrimination cases, the amount necessary to accomplish this goal is presumably the same regardless of whether the employer’s liability is premised upon a violation of state or federal law. In fact, state law compensatory damage awards may ex-
ceed the permissible federal award in employment discrimination cases because Congress has established specific Title VII and ADA damage limitations that apparently do not extend to parallel state law claims.

In any event, the plaintiffs in Sager were suing for injuries to their own interests, and not merely for those suffered by the victim directly. Thus, the court’s discussion of § 1983’s compensatory purpose may have little significance for most survival cases, because state survival statutes generally do not limit the right of survivors to recover for their own pain and suffering, but only their right to recover for the


404. See Sager, 543 F. Supp. at 295 (“In the instant action, . . . the plaintiff-parents . . . are not mere executors and are suing under § 1983 for injury to their own interests.”). The Sager court’s reference to this fact presumably was in response to the statement in Robertson v. Wegmann, 436 U.S. 584, 592 (1978) that § 1983’s compensatory objective “provides no basis for requiring compensation of one who is merely suing as executor of the deceased’s estate.” Another court has concluded that § 1983’s deterrent objective is likewise “not undermined by abating [an] action against one who is merely suing as the executor of the deceased’s estate.” Strickland v. Deaconess Hosp., 735 P.2d 74, 77 (Wash. Ct. App. 1987) (citation and internal quotation marks omitted). However, the latter conclusion is questionable. See Rose v. City of Los Angeles, 814 F. Supp. 878, 881 (C.D. Cal. 1993) (observing that fulfillment of federal deterrent objectives “cannot be made to depend upon the entity bringing the . . . lawsuit”) (citing Roman v. City of Richmond, 570 F. Supp. 1554, 1557-58 (N.D. Cal. 1983)).

405. See generally Gates v. Montalbano, 550 F. Supp. 81, 82-83 (N.D. Ill. 1982) (noting the “distinction between the survival of the claim of a decedent for injuries” and the separate claim “of the decedent’s next of kin”); Ascani v. Hughes, 470 So. 2d 207, 211 (La. Ct. App.) (observing that the claims of [a] decedent’s estate present a “different situation” from “the claim of decedent’s siblings for [their own] loss”), review denied, 472 So. 2d 919 (La. 1985).

406. See Morse, supra note 108, at 27 (“Because plaintiffs usually do not seek recovery under section 1983 for injury to their own interests as a result of a decedent’s death, a court [typically] has no occasion to reach the question . . . .”). The Sager court itself suggested that § 1983’s compensatory purpose would not have been undermined by the Colorado survival statute if the plaintiffs were only seeking to recover for the decedent’s injuries, because “mere executors are not truly injured parties pursuant to § 1983.” Sager, 543 F. Supp. at 295.

407. See, e.g., Variety Children’s Hosp. v. Perkins, 445 So. 2d 1010, 1013 (Fla. 1983) (discussing a Florida statute “allowing survivors to recover for their own pain and suffering while abating the right of any recovery on the decedent’s behalf”); Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083, 1092 (Kan. 1983) (Schroeder, C.J., dissenting) (noting that a decedent’s heirs are not precluded by the Kansas survival statute from “maintain[ing] an action in their own right for, among other things, ‘mental anguish, suffering, or bereavement’”). See generally Morse, supra note 108, at 35 n.112 (referring to the “maze of conflicting [state] damages rules existing for survivors attempting to recover for . . . pain and suffering of their own”). Indeed, the analysis in Robertson suggests that a state survival statute could not constitutionally preclude survivors from asserting federal civil rights claims arising from injuries “to their own interests.”
pain and suffering experienced by the decedent.\(^{408}\) In fact, the holding in *Robertson v. Wegmann*\(^{409}\) was based in part upon the premise that § 1983’s compensatory objective is irrelevant in survival cases\(^{410}\) because that objective simply cannot be fulfilled when the victim is deceased.\(^{411}\) In other words, because deceased victims cannot be compensated for their pain and suffering,\(^{412}\) and they are the only ones who should be compensated for that injury,\(^{413}\) damages for pain and suffering should logically abate upon the victim’s death.\(^{414}\) Any other re-

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\(^{408}\) See *In re Air Crash Disaster Near Honolulu, Haw.*, 783 F. Supp. 1261, 1264 (N.D. Cal. 1992) (observing that survival statutes do not address the losses of a decedent’s “survivors,” but the “pain and suffering . . . of the decedent up to the date of the decedent’s death”) (emphasis added). In other words, state survival statutes, like the common law *actio personalis* doctrine they abrogate, typically pertain “only to the victim’s own personal claims, such as for pain and suffering,” and thus have “no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim’s death.” *Moragne v. States Marine Lines*, 398 U.S. 375, 385 (1970). Thus, in *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 789 (Cal. 1997), for example, the California Supreme Court noted that the California survival statute’s prohibition of recovery for pain and suffering “applies only to causes of action personal to the decedent and not to causes of action that others may have . . . .”

\(^{409}\) 436 U.S. 584 (1978).


\(^{411}\) See *Culver-Union Township Ambulance Serv. v. Steindler*, 611 N.E.2d 698, 705 (Ind. Ct. App. 1993) (concluding that § 1983’s compensatory purpose is “incapable of fulfillment” in cases where the victim is deceased, because a decedent “cannot be compensated”).

\(^{412}\) See *Vulk v. Haley*, 736 P.2d 1309, 1313 (Idaho 1987) (observing that “an injured person who is dead cannot benefit from an award for his pain and suffering”); *Brown*, 518 F. Supp. at 664 (“It is clear that where the injured party is deceased, any damage award would not compensate him for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded.”); *Culver-Union*, 611 N.E.2d at 705 (“Obviously, when the injured person is deceased he cannot be compensated.”).

\(^{413}\) See *Sullivan v. Delta Air Lines, Inc.*, 52 Cal. Rptr. 2d 662, 664 n.3 (Ct. App. 1996) (observing that the decedent “is the only one who should be compensated” for his pain and suffering) (quoting Livingston, *supra* note 259, at 74), *rev’d on other grounds*, 935 P.2d 781 (Cal. 1997); cf. *Culver-Union*, 611 N.E.2d at 705 (observing that compensating survivors would “not accomplish the same goal” as compensating the victim); *Weeks v. Benton*, 649 F. Supp. 1297, 1309 (S.D. Ala. 1986) (concluding that an award of damages for the decedent’s injuries was “not necessary to compensate his survivors”).

\(^{414}\) See *Sullivan*, 52 Cal. Rptr. 2d at 664 n.3 (noting the view that “damages for a deceased’s pain [and] suffering . . . should not be recoverable”); *see also* Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 586 (Ct. App. 1996) (observing that a statutory exclusion of damages for pain and suffering represents a reasonable legislative judgment that “once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering”); cf. *Harrington v.
suit may effectively provide the victim's survivors with an undeserved windfall. As one jurist has stated: "The reason for the [statutory] exclusion is the belief that since the decedent alone endured the pain and can no longer benefit from the award, there is no reason for the survivors to be enriched as a result of the decedent's suffering." In short, the unavailability of a particular remedy may not be a sufficient basis for refusing to apply a state survival statute, because the Court in Robertson indicated that such statutes are inconsistent with federal law only if they are "generally" inhospitable to the survival of federal claims. Even courts like the one in Sager that have refused to apply state survival statutes in federal civil rights actions have acknowledged that this standard is met only when the state statute significantly

Flanders, 407 P.2d 946, 948 (Ariz. Ct. App. 1966) ("The Legislature apparently contemplated that once an injured person is dead he cannot benefit from an award for his pain and suffering.").

415. See supra note 257; cf. Sullivan, 52 Cal. Rptr. 2d at 664 n.3 ("It does not seem reasonable that an estate should be enhanced by the value placed... on the pain and suffering experienced by a dead man."); Holliday v. Pacific Atl. S.S. Co., 117 F. Supp. 729, 736 (D. Del. 1953) ("There is something incongruous... in close relatives seeking to [recover for] the pain and suffering sustained by the deceased... .") See generally Parkerson v. Carruth, 782 F.2d 1449, 1455 (8th Cir. 1986) (observing that a desire to "prevent the victim's heirs from receiving an undeserved windfall" may be a "sound reason[] for abating certain kinds of claims upon the death of the party allegedly injured").

416. See Ingram v. Howard-Needles-Tammens & Bergendoff, 672 P.2d 1083, 1092 (Kan. 1983) (Schroeder, C.J., dissenting) (italics omitted); cf. Kynaston v. United States, 717 F.2d 506, 510-11 n.10 (10th Cir. 1983) ("[P]ain and suffering is a personal thing that's suffered by the individual; it's not suffered by anyone else.") (internal quotation marks and citation omitted). However, at least one court has criticized opposition to the survival of certain types of claims "based upon the argument that justice does not require a windfall to the plaintiff's heirs," asserting that the proper inquiry instead is "why a fortuitous event such as death should extinguish a valid action." Moyer v. Phillips, 341 A.2d 441, 445 n.9 (Pa. 1975) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 126, at 901 (4th ed. 1971)); see also Canino v. New York News, 475 A.2d 528, 530 (N.J. 1984) (also quoting PROSSER); cf. Kuehn v. Children's Hosp., 119 F.3d 1296, 1303 (7th Cir. 1997) (describing the windfall argument as "too powerful" because "it implies that all... suits should abate with the death of the victim, not just suits seeking damages for pain and suffering").

417. The Robertson Court concluded that "the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality... ." Robertson, 436 U.S. at 592. That analysis would seem to be equally applicable to the abatement of a particular remedy, because a state statutory limitation on damages is less restrictive than a state statutory requirement that the entire action abate. See Brown v. Morgan County, 518 F. Supp. 661, 665 (N.D. Ala. 1981). But see Haluch, supra note 102, at 763 ("Congress enacted specific remedies to redress the discrimination done to ADA plaintiffs, and the removal of one or more remedies is as problematic as complete abatement of an ADA claim."). See generally Morse, supra note 108, at 25 ("That a state survival statute may not furnish... a remedy in a particular instance simply cannot be deemed inconsistent with section 1983... .").

restricts the policies underlying federal law. A survival statute that does not preclude the recovery of all damages, but only those for pain and suffering, may not satisfy this rigorous standard.

IV. THE SURVIVAL OF PAIN AND SUFFERING CLAIMS IN ADEA CASES

This article has focused primarily upon Title VII and ADA cases because damages for pain and suffering appear to be unavailable under the ADEA, although the ADEA itself is actually silent on this question. If such damages were recoverable, however, the analysis in

419. See Sager, 543 F. Supp. at 295; cf. Strickland v. Deaconess Hosp., 735 P.2d 74, 77 (Wash. Ct. App. 1987) (indicating that the Robertson standard is satisfied where the state statute "significantly restricts the type of actions that survive"). See generally Boykin, supra note 110, at 52 (observing that courts have rejected state statutory provisions that would "dramatically restrict" the recovery available in federal civil rights actions in which the victim is deceased).


421. See, e.g., Kynaston v. United States, 717 F.2d 506, 512 (10th Cir. 1983) (discussing a survival statute that "provided for a possible full recovery, except pain and suffering"); Woolridge v. Woollett, 638 P.2d 566, 568 (Wash. 1981) (discussing a survival statute that "preserve[d] the causes of action that a person could have maintained had he not died, other than for pain and suffering").

422. See Kuehn v. Children's Hosp., 119 F.3d 1296, 1303 (7th Cir. 1997):
The objection to making a . . . suit abate with the death of the victim is that it gives the injurer an incentive to make a clean kill and reduces the deterrent effect of the law by eliminating any . . . sanction for inflicting fatal injuries. The objection is diminished when the rule of abatement is limited . . . to one item of damages. See also Doore, supra note 19, at 393 ("Where some claims survive—even just one claim—the question of inconsistency is less stark.") (discussing Rosenblum v. Colorado Dep't of Health, 878 F. Supp. 1401 (D. Colo. 1994)); cf. Strickland, 735 P.2d at 77 (indicating that the Robertson standard is met “where state law does not provide survival of any tort actions”).


424. See Shinwari v. Raytheon Aircraft Co., 16 F. Supp. 2d 1308, 1324 (D. Kan. 1998) (observing that "the ADEA is silent" with respect to whether plaintiffs can recover "compensatory damages for pain and suffering"); Marchant v. Schenley Indus., 572 F. Supp. 155, 160 (M.D. Tenn. 1983) ("The ADEA does not allow or preclude expressly damages for pain and suffering."). One federal appellate court has stated that this silence is an indication that "pain and suffering awards were not contemplated by the draftsmen." Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 841 (3rd Cir. 1977); see also Marchant, 572 F. Supp. at 16 ("[T]he silence of the ADEA on the subject of damages for pain and suffering . . . support[s] the conclusion that Congress intended to deny recovery for pain and suffering in an ADEA action.").

425. In some respects, differences between the ADEA and other federal employment discrimination laws, and in particular the ADEA's adoption of the FLSA remedial scheme, actually make it "easier for plaintiffs to recover" in ADEA cases. EEOC v. AIC Sec. Investigations, 55
ADEA cases would differ from that in other employment discrimination cases, even though (like Title VII and the ADA) the ADEA is also silent with respect to whether claims arising thereunder survive the victim's death.

The differing treatment of this issue stems from the fact that 42 U.S.C. § 1988, the federal statute authorizing resort to state survival provisions in Title VII and ADA cases, only governs the survival of civil rights claims, and the ADEA is not a civil rights statute within the meaning of § 1988. Absent a provision comparable to § 1988 in

F.3d 1276, 1280 n.1 (7th Cir. 1995); cf. Alan A. Blakeboro, Allocation of Proof in ADEA Cases: A Critique of the Prima Facie Case Approach, 4 Indus. Rel. L.J. 90, 101 (1980) ("The legislative history of the two acts does not indicate any intent to grant less protection to the aged than to the groups protected by Title VII. In fact, by incorporating the enforcement provisions of the Fair Labor Standards Act into the ADEA, Congress has granted ADEA plaintiffs more protection . . . .") (footnotes omitted).


427. See generally Estwick v. U.S. Air Shuttle, 950 F. Supp. 493, 498 (E.D.N.Y. 1996) ("[T]he ADEA, ADA and Title VII are silent as to whether a cause of action survives a plaintiff's death . . . ."); Doore, supra note 19, at 384 ("Most of the federal civil rights statutes—such as section 1983, the Age Discrimination in Employment Act ("ADEA"), Title VII, and the ADA—are silent on the issue of survival.") (footnotes omitted).

428. See Asklar v. Honeywell, Inc., 95 F.R.D. 419, 422 (D. Conn. 1982). The same is true of the FLSA, the remedial provisions of which are incorporated into the ADEA. See id.


431. See Rosenblum v. Colorado Dep't of Health, 878 F. Supp. 1404, 1408-09 (D. Colo. 1994); cf. Hutchinson ex rel. Baker v. Spink, 126 F.3d 895, 898 (7th Cir. 1997) (observing that "state law governs the survival of . . . ADA claim[s]"). But see Estwick v. U.S. Air Shuttle, 950 F. Supp. 493, 498 (E.D.N.Y. 1996) (implicitly extending Khan to ADA claims); Doore, supra note 19, at 389 (exploring the question of whether the ADA is "among the provisions . . . to which 42 U.S.C. § 1988 is to be applied"). See generally Booth, supra note 102, at 269 ("When federal statutes are silent regarding claim survival, courts possess the discretion to utilize either state law or federal common law, whichever better serves the federal statute's intent.").

432. See Asklar, 95 F.R.D. at 422 n.2; see also Hutchinson, 126 F.3d at 898 (observing that "state law governs the survival of statutory civil rights actions"); Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 414 n.17 (7th Cir. 1980) ("[T]he reference to state law under 42 U.S.C. § 1988 is not applicable in non-civil rights actions."); Oliver v. United States Army, 758 F. Supp. 484, 485 (E.D. Ark. 1990) (stating that "§ 1988 requires courts to apply state law to questions of survival of federal civil rights actions").

433. See Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984); see also Glanz v. Vernick, 750 F. Supp. 39, 43 (D. Mass. 1990) (observing that the ADEA is not "enforced under a civil rights regime"). But cf. Doore, supra note 19, at 384 (characterizing the ADEA as a "federal
the ADEA, the courts typically look to federal common law, rather than to state survival law, in assessing the survival of a decedent’s claims. In Small v. American Telephone & Telegraph Co., for example, the court stated:

[T]he rationale used to find that a claim under the ADEA survives the death of a party significantly differs from the rationale used to find that a federal civil rights claim survives. . . . [T]he survival of civil rights claims is governed by state law. Conversely, federal common law determines whether a claim brought under the ADEA survives.

As a matter of federal common law, claims for pain and suffering generally survive the death of the injured party. Thus, to the extent such damages were recoverable in an ADEA action, the right to recover them presumably would survive the death of the particular age discrimination victim entitled to them, as is also true of most other civil rights statutes.


435. See Glanz, 950 F. Supp. at 42 (observing that “cases considering whether an action brought under the [ADEA] abates with the death of the plaintiff have uniformly applied federal law”); Khan, 679 F. Supp. at 756 (observing that “the state law principles which govern survival of federal civil rights actions . . . are not applicable” in ADEA cases). See generally Smith v. Department of Human Servs., 876 F.2d 832, 834 (10th Cir. 1989) (“The question of the survival of an action grounded in federal law is governed by federal common law when . . . there is no expression of contrary intent.”).


437. Id. at 1430 (citation omitted); see also Doore, supra note 19, at 384 n.104 (“The ADEA, while silent on the issue of survival, may not actually present the same problem. This is because federal common law, rather than 42 U.S.C. § 1988, has been applied to determine survival, and the result has usually been survival of the claims.”).


439. See Slatin v. Stanford Research Inst., 590 F.2d 1292, 1294 (4th Cir. 1979) (“Several district courts . . . have interpreted the ADEA . . . to permit an award of damages for pain and suffering.”); Flynn v. Morgan Guaranty Trust Co., 463 F. Supp. 676, 677 (E.D.N.Y. 1979) (“A number of district courts have awarded compensatory damages for pain and suffering . . . . ”).

440. In Fariss v. Lynchburg Foundry, 769 F.2d 958 (4th Cir. 1985), for example, the court observed that "Congress intended to preclude any award of general damages for pain and suffering under the ADEA", Id. at 964 n.7, but also noted that "there is no reason to suppose that a monetary claim . . . would not survive death", Id. at 964 n.8; see also Hawes v. Johnson & Johnson, Inc., 940
ADEA remedies. 441

However, there is some basis for reaching a contrary conclusion. 442 ADEA claims typically survive the victim’s death because they are deemed to be remedial in nature. 443 Claims that are penal, by contrast, generally do not survive under the federal common law applicable in ADEA cases. 444

In this regard, it has been argued that “pain and suffering damages awarded after the victim’s death are not compensatory because the person whom the damages would compensate is unable to receive the benefit of the compensation.” 445 In other words, because the ADEA’s compensatory purpose cannot be fulfilled by an award for a decedent’s pain and suffering, pain and suffering damages awarded after the victim’s death might properly be considered penal, rather than remedial, in nature. 446


441. See Fariss, 769 F.2d at 962 n.3 (“It is clear that an ADEA claim survives the death of the original plaintiff and is subject to revival by his legal representative as a matter of federal law.”). ADEA claims for liquidated damages are the exception. See infra notes 449-53 and accompanying text.

442. Interestingly, courts have occasionally looked to state law in assessing the survival of the FLSA remedies that are incorporated into the ADEA. See, e.g., Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 950-51 (D. Colo. 1979); cf. Southern Package Corp. v. Walton, 18 So. 2d 458, 459-60 (Miss. 1944) (using state law to justify damages provided under the FLSA).

443. See Smith v. Department of Human Servs., 876 F.2d 832, 837 (10th Cir. 1989) (observing that “claims for reinstatement, backpay, and other benefits under the ADEA are clearly remedial in nature”); see also Hawes, 940 F. Supp. at 703 (referring to the “generally remedial nature of the ADEA”); Khan v. Grotnes Metalforming Sys., 679 F. Supp. 751, 756 (N.D. Ill. 1988) (describing the ADEA as “remedial in nature”).

444. See Smith, 876 F.2d at 834-35 (“The general rule under the federal common law is that an action for a penalty does not survive the death of the plaintiff.”); Khan, 679 F. Supp. at 756 (“Federal common law has long recognized that actions which are penal in nature do not survive the death of a party.”).

445. Denton v. Superior Court, 945 P.2d 1283, 1286 (Ariz. 1997); cf. Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981) (“It is clear that where the injured party is deceased, any damage award would not compensate him for his injuries, because the cruel fact is that he is no longer present to benefit from any damages award.”).

446. See Asklar v. Honeywell, Inc., 95 F.R.D. 419, 423 (D. Conn. 1982) (observing that the ADEA’s “primary purpose is to compensate”); see also Khan, 679 F. Supp. at 756 (quoting Asklar).


448. See Denton, 945 P.2d at 1287 (discussing the contention that “because damages for pain and suffering paid after the victim’s death are non-compensatory, they are, in effect, quasi-punitive”); Holliday v. Pacific Atl. S.S. Co., 117 F. Supp. 729, 736 (D. Del. 1953) (suggesting that “pain and suffering sustained by the deceased . . . might be considered in the nature of exemplary
Indeed, the closest analogue to a pain and suffering award in ADEA cases appears to be an award of liquidated damages.\textsuperscript{449} The Supreme Court has characterized liquidated damages as “punitive in nature,”\textsuperscript{450} and several courts have likewise concluded that, for survival purposes, they are to be considered penal in nature.\textsuperscript{451} Thus, if pain and suffering damages were recoverable under the ADEA, they—like liquidated damages under that act\textsuperscript{452}—might not survive the victim’s death.\textsuperscript{453}

V. CONCLUSION

Because no federal employment discrimination law addresses the impact of a victim’s death, courts have typically looked to state survival law in analyzing that issue. When the applicable state survival statute precludes recovery for the decedent’s pain and suffering, courts have applied the statute only to the extent it was not deemed to be inconsistent with federal employment discrimination policies.

In analyzing this question, the prevailing view is that state survival

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\item or punitive damages”).
\item \textsuperscript{449} See, e.g., Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 687-88 (7th Cir. 1982) (concluding that “damages for pain and suffering are not available under the ADEA” in part because liquidated damages may be awarded to “compensate the aggrieved party for [such] nonpecuniary losses”) (quoting H.R. Conf. Rep. No. 950, at 13 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 528, 535); Bonura v. Chase Manhattan Bank, 629 F. Supp. 353, 366 n.7 (S.D.N.Y. 1986) (suggesting that an award of liquidated damages under the ADEA may compensate for “such intangible losses as... emotional distress”); Allen v. Marshall Field & Co., 29 Fair Empl. Prac. Cas. (BNA) 314, 322 (N.D. Ill. 1982) (“[T]he liquidated damages available under the ADEA upon a showing of willful discrimination can be viewed as serving the function of damages for emotional pain and suffering generally available in the compensatory framework of common law torts.”). \textit{But cf.} Schmitz v. Commissioner, 34 F.3d 790, 798 (9th Cir. 1994) (Trott, J., concurring) (“Under the law of this circuit, ADEA liquidated damages do not compensate for... emotional distress, or pain and suffering.”).
\item \textsuperscript{450} Trans World Airlines, Inc., v. Thurston, 469 U.S. 111, 125-26 (1985).
\item \textsuperscript{451} See, e.g., Smith v. Department of Human Servs., 876 F.2d 832, 836 (10th Cir. 1989) (concluding that “an action solely for liquidated damages under the ADEA is penal”); Hawes v. Johnson & Johnson, Inc., 940 F. Supp. 697, 703 (D.N.J. 1996) (stating that liquidated damages “are penal in nature under the ADEA”).
\item \textsuperscript{452} See, e.g., Smith, 876 F.2d at 837 (stating that “a suit for liquidated damages under the ADEA[s] does not survive [the victim’s] death”); Hawes, 940 F. Supp. at 703 (holding that “plaintiff’s claims for liquidated and punitive damages... under the ADEA did not survive his death”); Duart v. FMC Wyo. Corp., 859 F. Supp. 1447, 1451 n.2 (D. Wyo. 1994) (holding that an ADEA action “survives the death of the plaintiff, but that claims for liquidated damages will not survive his death”), aff’d, 72 F.3d 117 (10th Cir. 1995).
\end{itemize}
statutes precluding recovery for pain and suffering are not inconsistent with federal compensatory objectives. On the other hand, such a statute may impede federal deterrent objectives, at least in cases where the discrimination victim was elderly or infirm, or where the employer’s discriminatory conduct itself caused or contributed to the victim’s death. However, there is also support for the contrary view that, even under those circumstances, the preclusion of a particular remedy such as damages for the victim’s pain and suffering is simply not a sufficient impediment to deterrence to warrant a refusal to apply a state survival statute in federal employment discrimination litigation.

However, this analysis does not apply in all employment discrimination cases. Because damages for the victim’s pain and suffering are generally unavailable under the ADEA, the impact of state survival statutes precluding such recovery is an academic question in most age discrimination cases. In the event future Congressional action authorizes recovery for pain and suffering in ADEA cases, however, courts presumably will look to federal common law, rather than to state statutory law, in determining whether that remedy survives the victim’s death. And in applying federal law, the courts are likely to conclude that damages for pain and suffering do survive because they are remedial, rather than penal, in nature.